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Fair and just hearings for survivors of torture: the case for a paradigm shift in UK asylum appeals

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Abstract

This thesis seeks to answer the question;

Does current practice within the asylum appeal tribunal take sufficient account of the effects of torture on the individual to enable it to provide fair and just hearings and safe decisions for appellants who have been tortured and if not could practices from other jurisdictions of the UK tribunal system be adopted to improve access to justice for these appellants?

Review of scientific literature reveals the pervasive effects of torture on memory and ability to recount detail of torture experience. Review of current practice within the asylum appeal tribunal reveals a lack of understanding of these effects and inappropriate reliance on discredited indicators to cast doubt on the appellant's credibility. This collides with the adversarial system and a prevalent culture of disbelief to significantly reduce appellant's access to justice. Where asylum is at issue such an unjust decision may put the appellant's life at risk by allowing the individual to be removed to their country of origin to face persecution. The conclusion drawn from this research is that the adversarial system employed by the asylum appeals tribunal is not fit for purpose in asylum appeals particularly where the appellant has been the victim of torture, nor does it meet domestic and international expectations. Asylum appeals are not party to party appeals where it is appropriate for the tribunal to sit back and weigh up which party has "won"; rather the tribunal needs to behave proactively to ensure that all relevant facts have come to light and should seek to provide some equality of arms in these inherently unequal appeals. Asylum appeal tribunals should fully embrace the enabling and inquisitorial approach adopted by other jurisdictions within the Tribunal Service, shake free from a default position of disbelief and resist complacency arising from a belief that adverse decisions may not result in refolement. Medical reports addressing evidence of torture are not available in all appeals involving a history of torture: medical evidence may be the only corroborative evidence of torture available and provide information as to impact of torture on the individual's ability to give testimony. Medical evidence should be available in all cases where a history of torture is given and should be considered before any adverse findings on credibility are made. A deeply flawed approach to evaluation of such important expert evidence is shown and the suggestion made that access to medical expertise within the tribunal, as occurs in other tribunals, would be the most effective way to address this.

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Preface

The treatment of asylum seekers is one of the powerful measures of who we are as a nation and of our values. If we cannot provide comfort and safety to those who arrive on our shores having suffered torture, the horrors of war and cruelty of the most extreme kind, we have lost a sense of our own humanity¹

This thesis has been written because of the surprise I felt when I began writing medico legal reports on a voluntary basis for the NGO Freedom from Torture.² I was initially surprised at the combative stance taken by colleagues there toward the asylum appeal tribunal, which struck me as unwarranted based on my own experience as a medical member of other tribunals within the Tribunal Service. However, as a result of meeting clients and reading letters of refusal and tribunal decisions held within their files, my view subsequently changed and I too became concerned about what was happening in asylum appeals. Contact with one client of Freedom from Torture in particular caused me to doubt current practice. This young woman had declared a history of torture from her initial screening interview onwards, but despite this and despite legal representation, it was not until two years later with all appeal rights exhausted that a medical report was finally instructed. In the interim she had been found by the immigration judge not to be credible, her history of detention and torture was disbelieved and her appeal dismissed: this decision was upheld through all levels of onward appeal, there being no error of law found. The medical report which was eventually instructed gained her a fresh claim with fresh rights of appeal. She was again refused asylum by the Secretary of State but at the appeal hearing which followed the tribunal judge took the view that the medical report, which contained descriptions of 34 scars present on her body typical of or highly consistent with torture along with an account of the associated psychological sequelae of detention and torture, was sufficient when considered alongside the other evidence for him to accept that a history of detention and torture had been established. This caused him to arrive at a different view of the appellant's credibility: the appeal turned on this, and she was granted refugee status and protection on humanitarian grounds. I could not help but wonder at a

¹ Baroness Helena Kennedy QC, 'Foreword' in Kamena Dorling, Marchu Girma and Natasha Alter, *Refused: the experience of women denied asylum in the UK* [2012] Women for Refugee Women, 52 Featherstone Street, London

² Formerly known as Medical Foundation for the Care of Victims of Torture

system which allowed a woman for two years to declare that she had scars on her body to prove what she was saying without anyone, decision maker, legal representative or judge, instructing that a doctor examine her and provide a report. I was also particularly dismayed that a judge had been prepared to disbelieve her and find that she had not been the victim of torture and dismiss her appeal for protection without a medical report being considered.

Through working with clients of Freedom from Torture I have come to understand the effects that extreme trauma such as torture has on the individual. Through reading Reasons for Refusal letters and interview transcripts in these men and women's files, in preparation for completion of these reports, I have also began to understand the difficulties individuals face establishing entitlement to protection from future persecution. I decided that my medical background, knowledge of this group of appellants, and tribunal experience meant that I was well placed to examine access to justice for this vulnerable group and I undertook to do this.

Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature:

Date:

Printed Name: Patricia Moultrie

List of Abbreviations

DSM-IV – American Psychiatric Association, Diagnostic or Statistical Manual of Mental Disorders (4th Edn)

ECHR – European Convention on Human Rights

EU – European Union

FTT – First Tier Tribunal

HMCTS – Her Majesty's Courts and Tribunal Service

IARLJ – International Association of Refugee Law Judges

ICD-10 – International Statistical Classification of Diseases and Related Health Problems
10th Revision World Health Organisation

IJ – Immigration Judge

IP – Istanbul Protocol

MLR – Medico Legal Report

NGO – Non-governmental organisation

PTSD – Post-Traumatic Stress Disorder

UKBA – United Kingdom Border Agency

UNHCR – United Nations High Commissioner for Refugees

WPAFCC – War Pension and Armed Forces Compensation Chamber

Chapter One: Introduction

This study explores current practice of the asylum appeals tribunal of the Asylum and Immigration Chamber in those cases where the appellant claims to have been the victim of torture.³ Particular regard is paid to procedure within appeal hearings and the tribunal's approach to the availability of medical evidence and its treatment of that medical evidence in appeals where an account of past torture is given. A number of themes to the background of this thesis emerge, the historical development of asylum appeals with a move from executive to judicial oversight, the clarification of international responsibility principally through the Refugee Charter⁴ and Article 3⁵, and greater specialisation and integration of tribunals. It will be argued that current adversarial procedures fail to provide fair hearings for appellants and that medical evidence and expertise is being ineffectively used in asylum appeals to the detriment of appellants who have been tortured.

The issue is of contemporary importance as despite torture being prohibited under international law it continues to be practised in over 211 countries.⁶ Victims of torture seek protection from further persecution after arriving in the UK through the asylum process. Many of those seeking protection of their own human rights in this way have been persecuted because of trying to uphold the human rights of others in their country of origin. The role of the asylum appeal tribunal is crucial in an arena where there is real reason for concern regarding standards of decision making in the UKBA. Research in 2011 found that in 50% of the sample population, refusal by the UKBA was overturned at appeal.⁷ This is in line with figures confirmed by the UKBA which showed that between 35 and 41% of initial decisions on women's cases were overturned on appeal. This is of particular significance as, as will be described later, there is real reason for concern that an inappropriate approach to the consequences of rape and sexual torture is causing an inherent gender inequality to persist in asylum appeals.

³ Torture is defined as: any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. *United Nations Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment* (1984) Article 1(1)

⁴ UN *Convention Relating to the Status of Refugees* 1951

⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms

⁶ Amnesty International, Amnesty International Report (2010)

<http://www.amnesty.org.uk/news_details.asp?NewsID=18777> accessed 23 September 2012

⁷ Asylum Aid, Unsustainable: the quality of initial decision-making in women's asylum claims, p31
<<http://www.asylumaid.org.uk/data/files/unsustainableweb.pdf>> accessed 23 September 2012

One of the aims of torture is to destroy the psychological integrity of the victim through intense pain or suffering.⁸ The consequences of this psychological damage have a direct bearing on the individual's ability to engage with the asylum determination process, including the asylum appeals process. The key issue in this thesis is the extent to which asylum appeal process and procedure provide for proper evaluation of the evidence in appeals where the appellant has been the victim of torture, with the associated psychological problems that that entails. In deciding an asylum appeal the judge must determine whether the appellant has discharged the burden of showing that there is a well-founded fear of persecution on Convention grounds if returned,⁹ whether return would be contrary to the ECHR particularly to Articles 2 & 3¹⁰ and whether the individual comes within the terms of humanitarian protection detailed in paragraph 339C of the Immigration Rules.¹¹ The tribunal decides matters of potentially life and death importance to the appellant and deficient practices which disadvantage the appellant may therefore have devastating consequences. The most obvious adverse consequence for an asylum seeker wrongly found not to require protection is the risk of return to further persecution. In the case of an asylum seeker who has been tortured, disbelief of an account of torture which has been painful to disclose causes additional psychological damage to their already severely damaged psyche causing increased shame and lowered sense of self-worth. Disbelief of accounts of torture also leaves torturers free to act with impunity as evidence of human rights abuses are not accumulated. The tribunal generally lacks feedback on the correctness of its decisions as refolement means it is difficult, if not impossible, for the tribunal to learn from its mistakes.¹²

The thesis is of particular relevance now because of two developments within the tribunal system. In 2007 the Tribunals, Court and Enforcement Act created a new unified tribunal structure,¹³ and in 2010 the Asylum and Immigration Tribunal was abolished and through the Transfer of Functions Order 2010 the functions of the Asylum and Immigration Tribunal were incorporated in to the tribunal structure as the First Tier and Upper tribunal

⁸ U.N. High Commissioner for Human Rights, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1999) p 43

⁹ Convention Relating to the Status of Refugees (n4)

¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (n5)

¹¹ UK Immigration Rules

<<http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/>> accessed 23 September 2012

¹² Human Rights Watch has said it has uncovered evidence to show that at least thirteen Tamils forcibly deported to the country by UK immigration officials were subsequently tortured <<http://www.hrw.org/>> accessed 23 September 2012

¹³ Tribunals, Courts and Enforcement Act 2007 (Commencement No.1) Order 2007, SI 2007/2709

of the Immigration and Asylum Chamber of the Tribunal Service.¹⁴ The second development is the formation of the new Scottish Tribunal System. Immigration and asylum are reserved matters, the Scottish Government has however entered in to discussions as to how the new Scottish Tribunal System might provide administrative support to those tribunals which deal with reserved matters and its recent consultation document makes extensive reference to matters affecting procedure such as the use of judicial resources between jurisdictions and the governance system within the new Scottish Tribunal System. Both of these developments make it timely to look critically at practice and particularly to engage in comparisons with tribunals in other jurisdictions to seek examples of good practice. The developments in Scotland particularly appear to be an opportunity to question existing practice and to look beyond the confines of this particular jurisdiction for examples of best practice elsewhere in the tribunal system which could be adopted.

The principal question to be answered in this thesis is whether current practice within the asylum appeal tribunal takes sufficient account of the effects of torture on the individual to enable it to provide fair and just hearings and safe decisions for appellants who have been tortured in their country of origin and, if not, are there practices in other jurisdictions of the UK tribunal system which could be adopted to improve access to justice for these appellants? In undertaking a full literature search in preparation for the writing of this thesis it became apparent that there is relatively limited material on the subject of asylum appeal practice and nothing which sets out to compare and contrast the approach of tribunals within different jurisdictions of the UK tribunal service and explore why those differences might exist. The material which has been written has often arisen from parties very close to and sometimes amounting to stakeholders in, the system. Some of the material for this thesis had to be obtained therefore from sources generated by the author and as a result this thesis seeks to add to the limited literature available in this area of asylum.

The first issue to be examined is the move of asylum determination from an executive decision making process to a judicialised one and the extent to which immigration judges can be said to have successfully distanced themselves from the executive mindset. Asylum determination was initially a purely administrative process and the tension between executive decision making and judicial process which has now developed begins where the

¹⁴ Transfer of Functions (Immigration Appeals) Order 2010, SI 2010/21

process starts with the Home Secretary at port of entry¹⁵. Before the 1970s individual asylum decisions were virtually unknown. Decisions were taken en masse as matters of high policy by parliament and the Secretary of State in response to specific international events. In the 1980s various pressures such as the end of the Cold War and on-going risk of persecution of individuals in Africa, Asia and Eastern Europe led to individual applications being considered. Applications were considered by government officials in the Home Office on the basis of interviews as decision making was devolved from the Secretary of State to the Home Office. This was the position up until 1993 so that in this period the only means of challenging an adverse decision was by means of a judicial review. Throughout this time the pressure on the higher courts as a result of requests for

¹⁵ The UKBA, an Executive Agency of the Home Office, is responsible for determination of asylum claims. The state does not award refugee status; rather the state recognises that someone is a refugee by declaring that the criteria of Article 1(A) of the Refugee Convention are met in their case. Article 1(A) defines a refugee as someone who has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. Claims for asylum can be made either at port of entry or at an Asylum Screening Unit. The asylum seeker will have a screening interview to establish identity, route of travel to the UK and whether they might be returned to a third country (another European country through which they travelled to the UK). If the case is judged suitable for the detained fast track process, or if there is thought to be a risk of absconding, the asylum seeker may be detained. If the asylum seeker is not detained they will be given an appointment to attend for a substantive interview. During this period the asylum seeker has "temporary admission" to the UK and has to abide by certain conditions such as residing at a particular address and reporting to a designated immigration reporting centre or police station at specified intervals and has access to restricted financial support. At the substantive asylum interview reasons for claiming asylum are examined to establish whether or not an applicant is at risk of persecution for one of the five reasons outlined in the Refugee Convention. In doing so an assessment is made on the applicant's credibility by caseworkers. Asylum applicants are required to submit any other grounds for permission to remain in the UK at the same time as submitting their asylum application so that human rights grounds can be considered along with the claim for asylum. Interpreters are provided but only in exceptional circumstances are representatives funded by the Legal Services Commission or Scottish Legal Aid Board to attend interviews. The interview forms part of the evidence for the application and any subsequent appeals. A copy of notes taken by the interviewing officer is provided at the end of the interview. A recording of the interview is only made where that is requested by an unrepresented applicant. An initial decision is then made by caseworkers. Reference will be made to relevant country reports produced by the Country of Origin Information Service of the Home Office containing country specific guidance on the political and human rights situation. Three possible outcomes may follow: recognition as a refugee with five year limited leave to remain in the UK; refusal of refugee status but leave to remain on human rights grounds of humanitarian protection or discretionary leave; outright refusal. Humanitarian protection is granted where refugee status has been refused but where the applicant cannot be returned as they face serious risk of: the death penalty, unlawful killing, torture or inhuman or degrading treatment. To return to such a situation would be contrary to Article 3 of the European Convention on Human Rights. Discretionary leave may be granted outside the immigration rules where the criteria for humanitarian protection are not met in specific limited circumstances. This may be where; there is a claim under Article 8 of the ECHR; there is an Article 3 claim solely on medical grounds or severe humanitarian cases; in the case of an unaccompanied minor for whom adequate reception arrangements cannot be made; where asylum or humanitarian protection would have been granted but the individual is excluded or for other compelling reasons. Judicial review of the UKBA's decision may only be applied for where challenge can be made to the decision making process. The only route to further application with appeal rights is where a fresh claim can be achieved on the basis of the availability of new information not previously considered by the Home Office decision maker or immigration judge.

judicial review grew as did pressure for the provision of an appeals process which would allow affected individuals the ability to participate in a decision making process which was in turn undertaken by an independent judicial body. The move to an adjudicative as opposed to administrative route of appeal was established in 1993 through a right of appeal to the pre-existing immigration appeals system, the Immigration Appellate Authority and the Immigration Appeal Tribunal.¹⁶ Later in that decade the Immigration and Asylum Act 1999 introduced the first statutory right of appeal against immigration decisions on human rights grounds following the Human Rights Act 1998.¹⁷ Asylum appeals are now an integral part of the asylum determination process and although this thesis is concerned only with tribunals and, in particular, first tier tribunals an understanding of the tribunal's place in the larger asylum determination process is important.¹⁸

The second development occurring alongside the change to an adjudicative route of appeal from departmental decisions on asylum occurred in 2010 when the immigration and asylum tribunal was brought within the general administrative justice structure of the new unified tribunal service. This development exposes the jurisdiction more acutely to the expectations of a tribunal as contained within the influential Frank Report¹⁹ and more

¹⁶ Asylum Legislation in the UK; The UK signed the UN Refugee Convention in 1954 and the Protocol in 1968. The 1993 Asylum and Immigration Appeals Act incorporated the Convention into domestic law whereas previously the asylum system had been governed by immigration laws (Introduced "fast track" procedure, detention and fingerprinting). In 1996 the Asylum and Immigration Act was passed (introduced "white list" of "safe" countries of origin, extended scope of "fast track" procedures and introduced "safe third country" concept). Since then: the immigration and Asylum Act 1999 (introduction of one stop procedures and National Asylum Support Service and dispersal), the Nationality Immigration and Asylum Act 2002 (introduction of accommodation centres, regular reporting and a biometric data card - Asylum Registration card) , the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (withdrawal of asylum support for failed asylum seekers, power to make continued provision of accommodation for refused asylum seeker conditional upon participation in community activities, power to require electronic monitoring) , the Immigration Asylum and Nationality Act 2006 (statutory monitoring of detention facilities, tighter deadlines for provision fingerprints, penalties for employment of illegal workers).

¹⁷ Immigration and Asylum Act 1999, s 65 Nationality, Immigration and Asylum Act 2002, s 84

¹⁸ When an individual is refused a "refusal letter" will be issued setting out why the UKBA Home Office worker has refused the claim. This decision carries rights of appeal which are time limited. The appeal will be heard by the Immigration and Asylum Chamber of the First Tier Tribunal which is a fact based merits appeal jurisdiction. Onward appeal from this tribunal is available only on point of law to the Immigration and Asylum Chamber of the Upper Tribunal. In certain restricted circumstances, where the appeal raises "an important point of principle or practice" or where there is "some other compelling reason", there are onward rights of appeal to the higher courts – the Court of Appeal (in England and Wales), the Inner House of the Court of Session in Scotland or to the Court of Appeal (in Northern Ireland). The Upper Tribunal has been designated as a "superior court of record" and the reviewability of Upper Tribunal Decisions was recently addressed by the Supreme Court in two separate judgements *Eba v Advocate General for Scotland* [2011] UKSC 29 and *R (on the application of Cart) v The Upper Tribunal (Respondent)* following decisions by the Court of Session and Court of Appeal. The Supreme Court reached the same view as the Court of Session and Court of Appeal which was that Upper Tribunal decisions are themselves subject to review only on grounds of "important point of principle or practice" or "other compelling reasons".

¹⁹ Franks, O. *Report of the Committee on Administrative Tribunals and Enquiries* (1957) Cmnd 218

recent Leggatt Report²⁰ and this thesis explores to what extent the asylum appeal tribunal can be said to have kept pace with progress in other jurisdictions within that unified Tribunal Service.

The third significant development which is considered in this thesis, and discussed further in chapter two, is the superimposition of expectations on the tribunals arising from legislative developments in European law, Article 3 and the development of international law under the Refugee Convention.

Asylum appeals are taken against the associated immigration decision rather than the refusal of asylum as such. However after an appeal which determines that the appellant should not be removed the Home Office will send out a letter granting asylum. In this way the judicial body effectively determines the asylum claim. As asylum appeals concern risk of future persecution the tribunal is able to take account of evidence which has arisen after the initial decision.²¹ Onward appeal from the tribunal is on error of law grounds. The Immigration and Asylum first tier tribunal reaches its own decision through evaluation of the evidence and making of findings of fact. It is not its role to re-evaluate the facts found by another decision maker²². In that regard it is similar to many other tribunal jurisdictions. However, it is distinct from other tribunals in its approach as hearings are conducted on an adversarial basis and cross examination of the appellant is permitted. The approach in most other tribunals where an individual is appealing against a decision by the state is to conduct the hearing on an inquisitorial and increasingly enabling basis in an attempt to both increase participation by the appellant and to reduce as far as possible the inherent inequality of arms.

The asylum appeals process has been repeatedly restructured with a view to increasing efficiency in an attempt to foreshorten the process by which finality of a claim is reached. This resulted initially in the unification of the appeals structure into the single tier Asylum and Immigration Tribunal with review and reconsideration in a single tier and onward right of appeal to the ordinary court,²³ and later in 2010 in the re-formation of a two tier structure as it transferred in to the appellate structure of the First-tier and Upper Tribunal as the Asylum and Immigration Chamber of the Tribunals Service.²⁴ No other tribunal

²⁰ Leggatt, A. *Tribunals for users one system, one service* (2001)

²¹ Appellants normally attend the oral hearings and publicly funded representation is restricted: there are differences in Scotland and England in that in England there is a 'merits test' which means that the appellant must be judged to have a 40% or greater chance of success to receive legal aid for representation. The Home Office is represented by a Presenting Officer or Case Owner.

²² Robert Thomas, *Administrative Justice and Asylum Appeals* (Hart Publishing 2011) p 16

²³ Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s26

²⁴ Asylum and Immigration (Treatment of Claimants, etc) Act 2004

service has been reformed as often as the asylum appeals process and this may reflect the particularly difficult and high stakes decisions which they make. Decisions of this tribunal are frequently appealed further because of the impact of the decisions on appellants and as the second largest of the tribunals after Social Security this clearly produces a significant workload for the higher courts. Asylum appeals themselves are unique in the nature of the personal information which is disclosed and the broad range of evidence which the tribunals have to consider. It is clearly a jurisdiction where accuracy in decision making is crucial, but equally one where valid outcome measures are difficult to establish.

The significance of tribunal adjudication within this system of administrative justice, in short, is that in its purest sense as a judicial body the tribunal has no responsibility for implementing government policy but should act as an entirely independent arbiter. By this means the individual in an asylum appeal should receive a decision based purely on the facts of their case and the law applicable, including human rights legislation, uninfluenced by Home Office policy on immigration. However as is discussed in more detail below the legislation to be applied and in particular in this instance the Rules under which the tribunal operates themselves contain policy objectives.²⁵ In this way the distinction between adjudication and administration is in fact not as clear as it might initially seem.

The development of judicial asylum appeals needs to be set within the context of development in the administrative justice system generally. The purpose of tribunals is largely to provide an independent judicial appeal against negative decisions of administrative bodies.²⁶ Although initially there was some ambivalence as to whether tribunals were part of the judicial system, as opposed to being part of the administrative wing of government, the trend towards adjudication as opposed to administration was accelerated and consolidated by the report of the Franks committee in 1957.²⁷ Franks advocated a move towards a judicial approach and away from an administrative decision making approach. In support of this he identified three principles for the operation of tribunals; openness, fairness and impartiality. Procedural fairness is generally understood to guarantee that an affected individual has a real opportunity to participate in the decision making process and that the decision making process is carried out by a neutral decision maker. Accuracy of decision is another measure of the quality of tribunal process and reflects the degree to which a decision can be said to match the application of the correct law to the properly collected and evaluated facts of the case. The reality is that in tribunal

²⁵ Current legislation is the Asylum and Immigration (Treatment of Claimants, etc) Act 2004

²⁶ There are also some tribunals such as employment tribunals which hear party and party disputes

²⁷ Franks Report (n19)

adjudication accuracy and fairness have to be considered alongside cost to the public purse and timeliness of decision making. Clearly there may be tension between cost and timeliness on the one hand and fairness and accuracy on the other.

The Frank's Report in 1957 did not address the status quo whereby a myriad of tribunals of all sizes and format existed. The disparate nature of tribunals and the decision making systems they provided eventually became a source of concern as did the lack of an organisational structure,^{28 29} and in 2001 Sir Andrew Leggatt proposed a unified tribunal system whereby tribunals would come together to form one general administrative justice system.³⁰ In his report Leggatt noted that despite constituting a substantial part of the justice system methods within tribunals were old fashioned, training and IT under resourced, and management systems were inefficient. This was thought in part to be due to tribunals being separate bodies which had not become properly independent of the departments whose decisions were being appealed as they developed. Leggatt recommended the formation of an independent coherent user friendly Tribunal Service.³¹ In his comprehensive report Leggatt emphasised the particular characteristics of tribunals, the place of expertise and outlined a new inclusive structure for the tribunal service. He considered the approach which was to be taken by tribunals and detailed this as;

The tribunal approach should be an enabling one, giving the parties confidence in their ability to participate, and in the tribunal's capacity to compensate for any lack of skills or knowledge.³²

Although Leggatt advocated the formation of a unified tribunal service as means to increase independence and drive forward the enabling model of tribunal, commentators have noted that in the case of asylum and immigration the motivation in joining the two tier structure was to reduce the significant burden of asylum and immigration work in the higher courts and to promote fast decisions.³³ The operation of the administrative justice system has been said to be as heavily influenced by the need to use judicial resources optimally and implement policy in a timely fashion as it is by the need to ensure justice for

²⁸ Tribunals and Enquiries Act 1958

²⁹ Tribunals and Inquiries Act 1992

³⁰ Leggatt (n20)

³¹ These changes to the Tribunal Service were enacted by various pieces of legislation. The Tribunals, Court and Enforcement Act 2007 created a new unified tribunal structure. The Transfer of Functions (Immigration Appeals) Order 2010, SI 2010/21 taking effect on 15 Feb 2010 abolished the Asylum and Immigration Tribunal and incorporated its functions in to the new tribunal structure. The transfer has made little difference to the way appeals are heard by the first tier structure but has made significant change to the onward rights of challenge against first tier decisions

³² Leggatt (n20) para.7.5

³³ Thomas (n22) p 64

individuals.³⁴ The original motivation behind asylum and immigration joining the tribunal service may be responsible at least in part for the way in which this tribunal has continued to operate largely in isolation, detached to all extent and purpose from progress being made in other jurisdictions. This arm's length approach to the unified tribunal service is evident in the jurisdiction's continued adherence to having its own unique set of rules rather than adopting, as other jurisdictions do, rules made by the Tribunal Procedure Committee.³⁵ The Administrative Justice and Tribunals Council commented on this with concern in response to a consultation document in 2008.³⁶ Not only are the rules which govern jurisdictions other than immigration and asylum made by the Tribunal Procedure Committee rather than a Minister of the Crown: most importantly they are in significant terms the same rules, this being particularly evident in their expression of the "overarching principle". Tribunal rules and the "overarching principle" in particular are discussed in detail in chapter two. Process and procedure within individual tribunals is determined by a combination of the rules, practice directions and guidance notes in operation, and the culture or ethos of the jurisdiction.³⁷ The chamber's rules are therefore significant. It is difficult to determine whether tribunal practice is driven by interpretation of the rules influenced by tribunal

³⁴ Concern that decisions sometimes have less to do with the merits of the case than with politics are raised by statistics such as the comparative refugee grant rates between countries for the same group of asylum seekers. With the same circumstances obtaining in the country of origin and therefore apparently similar risk of future persecution for members of an ethnic group if returned asylum seekers might reasonably expect to have broadly the same likelihood of being granted refugee status wherever their application is heard. However the impact of policy in countries is great, for example, the effect of national lists of "safe haven" countries is to produce enormous discrepancies in grant rates between receiving countries. The effect of this can be seen in the proportion of asylum seekers from Sri Lanka given full refugee status in the UK between 1989 and 1998 which at 1% was remarkably low when in the same period Canada granted refugee status to over 80% of applicants and France to 74%.

³⁵ The Consolidated Asylum and Immigration (Procedure) Rules 2005 which are in force from 29th November 2010 contain significant amendments to the original rules, the 2005 rules. The 2005 rules were made by the Lord Chancellor after consulting with the Council on Tribunals in accordance with section 8 of the Tribunals and Inquiries Act 1992. The Asylum and Immigration Tribunal (Procedure) (Amendment) Rules 2008 were made by the Lord Chancellor on consultation with the Administrative Justice and Tribunals Council. This is to be compared with the situation of other tribunals within the Tribunal Service whose rules are made by the Tribunal Procedure Committee (an advisory Non-Departmental Public Body, sponsored by the Ministry of Justice) and which are then allowed by the Lord Chancellor under powers conferred by the Tribunals Court and Enforcement Act 2007

³⁶ Letter AJTC to the UKBA 2008 < <http://ajtc.justice.gov.uk/docs/immig-appeals-consultation-response-ajtc-letter.pdf> > Accessed 23 September 2012. In this letter the AJTC state; It is the Council's view that the Tribunal Procedure Committee is the appropriate body to make rules for this jurisdiction as it is for other tribunal jurisdictions. The Consultation Paper gives no reasons for taking a different approach. In the Council's view, the appearance of independence would be enhanced by conferring the rule making power on an independent body, rather than on a Minister of the Crown (albeit subject to consultation with the Council).

³⁷ Asylum and Immigration tribunal (Procedure) Rules 2005 as amended; Practice Directions Immigration and Asylum Chambers of the First Tier Tribunal and the Upper Tribunal; Guidance Note on Unrepresented Appellants who do not understand English; Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance; Immigration Bench book: Immigration and Asylum Court of Appeal Civil Division 2005

culture or whether the rules themselves have influenced the development of the culture and ethos of the jurisdiction. In either event a complex interaction is at play and consideration of the rules which govern asylum appeals is undertaken in detail in chapter two. In chapter two procedure within the asylum appeal tribunal is also considered in detail with particular regard to the extent to which the adversarial nature of asylum appeal procedure can be said to result in fair asylum appeals hearings where appellants have been victims of torture.

This is of considerable importance in asylum cases because research, discussed in this thesis, has shown that immigration judges are not as free from the executive mindset as they should be. This argument is made more tentative because of the difficulties of carrying out research in this field. Research within the field of asylum appeals is notoriously difficult because of a combination of; ethical considerations in view of the subject matter of appeals, restricted access to asylum determinations and restricted access to the judiciary. It is important for the purposes of this thesis however to have some indication of current practice to base criticism and evaluation upon. For the purposes of this thesis therefore two pieces of existing research are mainly relied upon as indicative of current practice, this is supplemented where necessary with material from Robert Thomas's recent book which was itself the result of that author's extensive research.³⁸

The first piece of research reviewed is an examination of judicial assessment of the credibility of asylum seekers in the UK undertaken by Catriona Jarvis, then an Immigration Appeals Adjudicator.³⁹ The research which forms the basis of this thesis and published paper was undertaken in 1999 and 2000. As this is now a decade or more ago it is important to establish whether these findings remain valid and to do that a second piece of research Body of Evidence, published in 2011, is analysed.⁴⁰ Body of Evidence is the result of research undertaken by a non-governmental organisation (NGO) into the treatment of its Medico-Legal reports (MLRs) by Immigration Judges in asylum appeals and provides insight into immigration judges' practice in evaluation of evidence. The research examined within this thesis criticises first the approach to assessment of credibility by immigration judges and secondly evaluation and weighing of medical

³⁸ Thomas (n22)

³⁹ Catriona Jarvis, For these or any other reasons: examination of judicial assessment of the credibility of asylum seekers in the United Kingdom with particular reference to the role of the immigration adjudicator (University of East London 2000). Catriona Jarvis, "The Judge as Juror Re-visited" [2003] Immigration Law Digest 16. Quoted extensively in Anthony Good, *Anthropology and Expertise in the Asylum Courts* (Routledge-Cavendish 2007). Jarvis had access to immigration judges and examined their approach to assessment of credibility which is acknowledged to be crucial in these appeals.

⁴⁰ Freedom from Torture, 'Body of Evidence: Treatment of medico-legal reports for survivors of torture in the UK Asylum Tribunal', <<http://www.freedomfromtorture.org/sites/default/files/documents/body-of-evidence.pdf>> accessed 23 September 2012

evidence of torture. Together these two pieces of research call into doubt the integrity of the adjudication process in asylum in particular where there is a history of torture. The second piece of research also raises issues which go beyond failure to live up to the responsibilities of tribunals as described by Leggatt, in that it reveals expert medical evidence being dismissed out of hand by lay immigration judges.

Judicial assessment of credibility was extensively examined by Jarvis firstly by focussing on how adjudicators attach weight to evidence and secondly, by examining whether the gender of appellants or judges was significant.⁴¹ It is recognised by the researcher that those judges who volunteered for interview following completion of the initial questionnaire do not represent a random selection of those adjudicators who had completed the questionnaire and are likely to represent an over representation of those judges who at least believe themselves to be open to self-reflection.⁴² At interview the researcher explored the reasoning behind the replies given in the questionnaire particularly where evidence was evaluated differently dependent upon whether the appellant gave oral evidence. Some additional questions were asked at interview regarding female appellants and opportunity was given for the adjudicators to add anything or identify anything they considered would help them in their task of assessing credibility. In her own thesis based on this research Jarvis discusses “judicial knowledge” and raises the unresolved question of what knowledge it is that members of the judiciary have, how is it they come to have this knowledge and whether this undisclosed knowledge is based on empirical evidence.

A number of worrying findings come to light in this research, amongst them the finding that demeanour was held to be a significant indicator of credibility by a number of respondents and was relied upon by some, two saying that it was determinative. One judge reported that, whilst knowing better than to rely on demeanour, she would in the absence of corroborative evidence rely on “gut instinct”. Also the finding that late disclosure of torture was ranked in the top ten of factors which would weigh against the appellant. There

⁴¹ The researcher contacted 180 immigration adjudicators asking them to complete an attached questionnaire, provide separate comment if wished, and indicate whether they would be willing to be interviewed. Of the questionnaires sent 41 of those returned were completed in a manner suitable for analysis. The questionnaire listed 27 factors identified as playing a part in judicial assessment of credibility. Two responses graded from 0-10 were sought for each factor, one identifying the weight which would be attached to the factor following oral evidence having been given and one where either no oral hearing took place or no oral evidence was received⁴¹. Some factors were jurisdiction specific (e.g. circumstances of entry to the UK) and some common to all judicial assessments of credibility. The 27 factors were sourced from the law, the immigration rules, refusal letters, determinations and the adjudicators themselves. Of those that expressed a willingness to be interviewed 10 were selected largely on the basis of practical considerations of availability.

⁴² The results of the interviews are perhaps all the more remarkable given this self-selection of the respondents.

was an expectation that such late disclosure would be supported by an expert medical report showing why late disclosure had occurred, where that was not available the adjudicator was less likely to accept the truth of the reasons given for such late disclosure. This is worrying because demeanour has been discredited as a reliable basis upon which to reach a finding on credibility for some time and, as will be shown in chapter three, late disclosure is a well-recognised feature of torture, particularly sexual torture. Generally the interviewees whilst endeavouring to start their assessment of credibility from a neutral standpoint acknowledged that they were influenced by their own characteristics, upbringing, views of the world and the demeanour including, remarkably frankly, the attractiveness or otherwise of the witness. There was significant variation in insight into this propensity amongst the judges. One judge responded that the single most important factor in the outcome of an appeal was the identity of the judge hearing the appeal and described the process as a lottery. Whilst these findings were on the whole inconsistent, there were two consistent findings of concern. One being that factors in favour of the appellant were accorded less weight where the appellant failed to attend the hearing, or attended but did not give evidence, despite the numerous decisions which hold that it is an error of law for an adjudicator to find an appellant not credible where he or she wishes to rely on documentary evidence or because of he or she does not appear to give oral evidence.⁴³ The other, that lodging a claim in one's own right after dismissal of a spouse or other family member's appeal was rated within the top five of important factors which would weigh against the appellant when credibility is being assessed. This jeopardises fair hearings for female asylum appellants as it is normal practice for a woman to be treated as a dependent of their male relative at initial application and the full circumstances of her individual claim for asylum may only be heard at a subsequent appeal arising from an application made in her own right. The research shows that some judges are relying on discredited indicators of credibility, not accounting for the effects of torture on the individual and inadvertently imposing gender inequalities in asylum. The author concludes that a lack of consistent approach has been found with unexpected differences in the weight accorded to factors dependent upon whether or not oral evidence has been taken and weight being attached to factors in circumstances where it should not be taken into account at all. Assessment of demeanour is highlighted as a case in point.⁴⁴ However the key finding was that there was a lack of consistency in the assessment of credibility "a

⁴³ Jarvis (n39) p 20

⁴⁴ Jarvis (n39) p 39

clearly discernible and adequate methodology applied with consistency to this most important of tasks cannot be said to exist”.⁴⁵

The conclusion of this research was that there is an identified need to ensure changes to legal behaviour. Of particular relevance to this thesis is the finding that late disclosure of torture is likely to weigh against an appellant in the absence of a medical report, despite it being a well-recognised pattern of behaviour in traumatised and particularly raped appellants. Although the author appeared to look to increased legal representation, and of the effectiveness of steps being taken to control the quality of legal services provided as a means to address these failings,⁴⁶ chapter two of this thesis examines instead the adequacy of the tribunals’ own procedures.

The first piece of research evidence discussed above focussed on assessment of credibility, the second piece of research evidence reviewed is concerned with accuracy of decision making focussing as it does on the proper evaluation of medical evidence by the tribunal.⁴⁷ A number of key findings are made in the research. In just over half of the determinations reviewed the evidence of the medico legal report was not accepted in full by the tribunal despite the acknowledged expertise of Freedom from Torture MLR writers. Looked at another way this means that in over 50% of these cases the judge has effectively said that he is unwilling to accept the professional opinion of an expert. The medical practitioners who undertake medical reports on behalf of this NGO all have extensive relevant clinical experience which is fully detailed within the reports, as is their commitment to on-going specialist training in forensic medicine and adherence to the strict methodology developed by the organisation - which has been commented upon favourably in many higher court decisions. Despite this immigration judges sitting alone with no medical qualification have refused to accept this medical evidence and have dismissed it.⁴⁸ This research demonstrates

⁴⁵ Catriona Jarvis “The Judge as Juror Re-visited” [2003] Immigration Law Digest 16, 15

⁴⁶ Jarvis (n45) 17

⁴⁷ Body of Evidence (n40) Body of Evidence is the result of research undertaken by the NGO Freedom from Torture (previously Medical Foundation for the Care of Victims of Torture) in to the treatment of their Medico-Legal reports (MLRs) by Immigration Judges in the Tribunal. The human rights charity undertook a desktop study of all those tribunal determinations made on appeals involving the 300 MLRs they had produced in a 12 month period they were able to access. Although the sample was disappointingly small the researchers conclude that it was sufficient to be regarded as significant and representative and that their findings were therefore robust. Analysis of compliance of tribunal practice with available good practice standards and guidelines was undertaken. Recommendations were made within the report to the Presidents of the First-tier and Upper Tribunals (Asylum and Immigration Chambers), to the Tribunals Procedures Committee and to the Senior President to address key findings of the research.

⁴⁸ However in all of those cases where the MLR is accepted in full by the tribunal the appeal was allowed. In 9 cases, although clinical evidence of torture is accepted, the cause attributed by the claimant is not and the cases are dismissed on the grounds of lack of credibility. Of the sample cases, by definition cases where

both the potential impact of medical evidence in asylum appeals and the importance of the tribunals regard to that medical evidence. Qualitative analysis of tribunal determinations as part of this research demonstrated a worrying lack of consistency in approach to medical evidence by immigration judges and a similarly varying lack of regard to good practice guidelines. In some cases the judges dismissed the medical evidence out of hand on the basis of incompatibility with their own findings,⁴⁹ and appellants came in for criticism for trying to win their appeals.⁵⁰ Judges may also prefer their own forensic opinion on attribution of scarring to that of the medical practitioner, despite acknowledging the doctor's expertise.⁵¹ It is of particular concern that in the cases reported here the doctor writing the report has found evidence of scarring that is "diagnostic" of torture by Istanbul Protocol standards,⁵² indicating a very high likelihood that torture has taken place as alleged, but in both cases rather than considering that evidence in the round with the other evidence the judge has taken a view on credibility excluding the medical evidence and then asked himself whether the medical evidence alone causes him to reverse that view; where it is not the expert evidence is dismissed. The methodology and expertise of Freedom from Torture MLR writers is recognised by the tribunal as is the organisation's adherence to the requirements of the Istanbul Protocol. Despite this and without any medical expertise or contrary medical opinion the Immigration Judge decides to substitute his own opinion as to the attribution of scarring -that being that he does not know what caused it but he does know that it wasn't torture as claimed and as is the opinion of the recognised expert in the field.

MLRs are available to the tribunal, 49% were allowed as compared to the 27% overall success rate in the tribunal in the same period

⁴⁹ Body of Evidence (n40) 34 Case 2 The IJ states: .. the finding simply does not fit in with my conclusions as to the credibility of the Appellant's account. After careful consideration I conclude that the medical report does not persuade me that my findings on credibility must be wrong... I conclude that although the scars on the Appellant's body do present as evidence of torture I am not satisfied that they were incurred in the manner claimed by the Appellant.

⁵⁰ Body of Evidence (n40) 34 Case 2 The IJ states:...the claimant has set out to provide evidence to support their asylum claim.

⁵¹ Body of Evidence (n40) 35 Case 20 The IJ accepts that the doctor is 'an expert' and mentions the fact that the 'expert' finds there is one scar which is 'diagnostic' and a further 8 scars which are 'typical' and 4 which are 'highly consistent' with the appellant's attribution. But he then says 'Given my adverse findings of credibility....I find the scars were not attributed to the torture as claimed by the appellant'.

⁵² Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations New York & Geneva, 2004. The Istanbul Protocol was primarily developed with the aim of assisting states in the prevention of torture, and holding perpetrators of such torture to account, through provision of a tool with which to carry out effective documentation of torture. It contains the first set of internationally recognised standards for the effective examination, investigation and reporting of allegations of torture and ill-treatment and has been endorsed and promoted by the UN and other key human rights bodies. Hereafter referred to as the Istanbul Protocol.

It is acknowledged that Body of Evidence is the result of analysis of a relatively small sample of determinations by a NGO concerned with the care of victims of torture. A larger sample upon which to base findings would have been preferable. The sample included all those determinations which were obtained however and can be held to be a representative sample of determinations of the NGO's clients. The research methodology is clearly explained within the report, professional researchers are employed by the organisation and any bias on the part of researchers in interpreting the reasons given by judges is unlikely to have affected the quantitative aspects of the research. The report quotes extensively from determinations which it has analysed and despite its limitations this research has demonstrated both the importance of medical evidence within asylum appeals and an unsound approach to medical evidence. The pieces of research reviewed here thus demonstrate that asylum appeal practice is flawed in the crucial areas of assessment of credibility and evaluation of medical evidence: in asylum appeals involving torture survivors these are the bedrocks of a fair hearing. The history of torture and escape being given by appellants in this jurisdiction is almost characteristically implausible to the ears of western judges who may be influenced by feeling that the average man or woman would lack the determination to survive in the circumstances being described.⁵³ The significant point though is that for an implausible story to be believed a high degree of personal credibility has to be established and this will be impossible to achieve within asylum appeals if discredited markers of lack of credibility are relied upon and the only corroborative evidence available, expert medical evidence of torture, is not given due weight.

This thesis seeks to demonstrate that the unacceptable practice revealed by these researchers, whilst it may stem from a number of factors, is promoted and maintained by the tribunal's adherence to an adversarial model which is particularly unsuited to appeals involving victims of torture. This conclusion is shared by another NGO:

Despite these efforts, a 'culture of disbelief' persists among decision-makers; along with lack of access to legal advice for applicants this is leading to perverse and unjust decisions. The adversarial nature of the asylum process stacks the odds against asylum seekers, especially those who are emotionally vulnerable and lack the power of communication. Some of those seeking sanctuary, particularly women, children

⁵³ They may be correct in part in this regard and those torture survivors who reach our shores to claim asylum may represent an exceptional group of individuals.

and torture survivors, have additional vulnerabilities that are not being appropriately addressed.⁵⁴

This chapter suggests that current practice does not take sufficient account of the effects of torture on the individual to enable it to provide fair and just hearings and safe decisions for appellants who have been tortured and raises two broad areas of tribunal practice which are of concern, the adversarial approach and its effect on assessment of credibility and the tribunals' use of medical expertise. These aspects of practice are considered in detail in the two chapters which follow.

⁵⁴ Independent Asylum Commission, 'Independent Asylum Commission: Fit for Purpose yet?' (2008) <<http://www.independentasylumcommission.org.uk/files/Fit%20for%20Purpose%20Yet.pdf>> accessed 23 September 2012

Chapter Two: Adversarial asylum appeals and appellants who have been tortured

The significance of the Leggatt report to the development of tribunals has already been introduced in chapter one.⁵⁵ This chapter examines Leggatt in more detail and looks at practice in other tribunals and at tribunals' responsibilities with regard to international law. The conclusion reached in this chapter is that asylum tribunals are failing to meet the expectations raised both of by Leggatt and internationally. The principles of good tribunal practice enshrined in Leggatt are of particular importance in asylum cases involving torture firstly because of the inherent psychological problems suffered by appellants and secondly because of the need to protect the individual from refoolment by the state where there is a danger of future persecution. The UK is under international obligation to prevent the state from returning individuals to their country of origin to face persecution under both the Refugee Convention and the ECHR.

Leggatt and the enabling role of the tribunal

A crucial aspect of the Leggatt report was requiring tribunals to act in a positive enabling role. Asylum appeal tribunals, unlike a number of other jurisdictions within the tribunal service, operate an adversarial system in which immigration judges avoid intervening other than to clarify points. It is argued in this thesis that in appeals within this jurisdiction where appellants already have multiple barriers to effectively participating in these appeals such as language and cultural barriers, psychological disorders and difficulty obtaining effective legal representation this is not fit for purpose.

This is particularly important because as they are moved around the country, and as specialised legal firms close as a result of changes to the legal aid system, asylum seekers struggle to find and maintain quality legal representation.⁵⁶ This increases the need for the judiciary to step forward as envisaged by Leggatt to compensate for the appellants lack of skills and/or knowledge and to attempt to provide some equality of arms in these appeals. The need for immigration judges to take a more active part in proceedings and thereby adopt an inquisitorial approach has been raised by a number of commentators.⁵⁷ Leggatt clearly intended tribunals approach to be an enabling one saying tribunals need to be: “alert for factual or legal aspects of the case which appellants may not bring out, adequately or at all, but which may have a bearing on possible outcomes”.⁵⁸ In this thesis

⁵⁵ Leggatt (n20)

⁵⁶ David Burgess, ‘Legal Representation Can Kill’, (1997) NLJ Vol 147 Issue 6784 410

⁵⁷ Thomas, R., Assessing asylum and immigration determination processes, paper presented at the Asylum, Migration and Human Rights Centre (2006)

⁵⁸ Leggatt (n20) Para 7.5

it is argued that a tribunal which allows an ill-informed appellant to proceed with an appeal involving a history of torture without directing that medical evidence be made available is failing in its duty to be alert for factual aspects of the case which the appellant may not bring out adequately. There is no doubt that such a failing may have considerable impact on the possible outcome.

Jacob, a judge of the Upper Tribunal, states that any aspect of procedure which enhances access to the judicial process increases the chances that the party will secure substantive justice.⁵⁹ This thesis argues that the formal and adversarial approach of asylum appeal tribunals reduces access to the judicial process by these traumatised appellants and thereby reduces the chance that such appellants will secure substantive justice in these crucial appeals. With regard to the interaction between procedure and substantive Justice Edward Jacobs says:

Procedure exists to assist in achieving substantive justice and substantive justice can only be attained in the context of procedural justice. But procedural justice constrains the extent to which substantive justice can be realised and therefore helps to define what substantive justice in law means. Substantive justice has no meaning in law once separated from the procedure that provides the only context in which it can exist.⁶⁰

There is an overriding requirement of procedural fairness in relation to hearing and assessing evidence.⁶¹ Tribunal Rules along with Practice Directions and Guidance form the basis of procedure within tribunal jurisdictions.⁶² The essentially generic nature of

⁵⁹ Edward Jacobs, *Tribunal Practice and Procedure* (Legal Action Group; 2nd Revised edition 2011) 3,27

⁶⁰ Jacobs (n59) 3.34

⁶¹ *HA and TD v Secretary of State for the Home Department* [2011] CSIH 28.

⁶² The Asylum and Immigration Rules and the “common set” of tribunal rules, here illustrated by the rules which govern the Social Security tribunals, both have an expression of the “overriding objective” but it is expressed in significantly different terms; in “other” tribunals for example Social Security the overriding objective is expressed as;

2.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) Dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) Avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) Ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) Using any special expertise of the Tribunal effectively; and

(e) Avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

tribunal rules is promoted by the Senior President of Tribunals (HMCTS) who, on introducing a Digest of Upper Tribunal Decisions on procedural issues on the Judiciary Website in February 2012, stated that it was his intention in bringing the decisions together from individual databases to contribute to the cross-Chamber citation of those authorities and thereby to help create a more cohesive body of procedural law. The intended result is that the decisions selected would collectively form the basis of a unified procedural jurisprudence. In so doing he states that the rules of procedure that govern the Upper Tribunal and the First-tier Tribunal are essentially generic, with only those modifications necessary to take account of the needs of different jurisdictions. Tribunal practice is not determined by statute as either adversarial or inquisitorial and the factors which drive it towards an inquisitorial approach are considered next.

There is relatively little written in this field of law and what is available tends to be writings of experienced judges. Practice is influenced through training and appraisal which follows guidance in the Bench book and in the form of Practice Statements and Practice Directions issued by the Presidents of the various chambers. Social Security tribunals are encouraged to discharge the inquisitorial function.⁶³ In an in-house publication of the Judicial College, Bano discusses the factors which drive tribunals to act inquisitorially.⁶⁴ These he identifies as; the legislation which the tribunal is required to interpret, public

(b) co-operate with the Tribunal generally.

In the Immigration and Asylum chamber the overriding objective is expressed as follows;

4. The overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible; and, where appropriate, that members of the Tribunal have responsibility for ensuring this, in the interests of the parties to the proceedings and in the wider public interest.”

The overriding objective of the Immigration and Asylum chamber is silent on what elements constitute a fair and just hearing. The Immigration and Asylum rules are also silent on “Dealing with the case in ways which are proportionate to the importance of the case” and “Avoiding unnecessary formality and seeking flexibility in the proceedings” when in fact the asylum appeal tribunal can be criticised on both these fronts. In addition “to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible” has on the face of it a significantly greater emphasis on speed of disposal of the appeal than “Dealing with a case fairly and justly includes— Avoiding delay, so far as compatible with proper consideration of the issues”. Lastly there is the issue of what is meant by “wider public interest” in the direction to the asylum tribunal to consider not only the interests of the parties to the proceedings but also to the wider public interest. There is no similar provision in the rules which govern other tribunals and it is difficult to know how this is meant to be interpreted given that one of the parties to the proceedings is the Secretary of State for the Home Department who might reasonably be held to represent the wider public interest in the form of the government. Is the “wider public interest” to be read as advice to judges to be alert to case law emanating from Strasbourg in their decision making or is it the more obvious answer that it is a blatant insertion of government policy into the tribunal rules with the inference that the interests of the individual asylum seeker will commonly be in conflict with those of the wider public.

⁶³ HM Courts & Tribunals Service, Social Security and Child Support Tribunal, The Benchbook, Twelfth Edition (February 2012)

⁶⁴ A Bano, “Fundamentally different from Courts” Tribunals Journal (a publication of the Judicial College), Summer 2011

interest in just and correct decisions (where he cites as an example of tribunals in which there is legitimate public interest immigration), the desirability of consistent decision making where there are similar facts and “equality of arms”. This article notes that the term “inquisitorial” in the tribunal context first appeared in 1958 when Diplock J held “A claim by an insured person to (disablement) benefit is not truly analogous to a *lis inter partes*...If analogy be sought in other branches of the law, it is to be found in an inquest rather than an action”.⁶⁵ Bano further notes that this concept was extended by the House of Lords where they upheld the claim on the basis that the department was in possession of national insurance records from which it could obtain the information necessary to decide Mr Kerr’s entitlement to benefit.⁶⁶ Baroness Hale concluded “What emerges from all of this is a cooperative process of investigation in which both the claimant and department play their part.” Bano highlights that the basis of these decisions was not that the tribunals that heard them are inherently inquisitorial but rather that the legislation applied by the tribunals required an inquisitorial approach. It is noted that neither the Tribunals and Inquiries Act 1958 nor the Leggatt review seek to restrict tribunals to acting in either an adversarial or inquisitorial manner. However, Leggatt says:

We are convinced that the tribunal approach must be an enabling one: supporting the parties in ways which give them confidence in their own abilities to participate in the process, and in the tribunal’s capacity to compensate for the appellant’s lack of skill or knowledge

Bano later discusses in more detail the meaning of the term “inquisitorially” as used to describe tribunals’ actions and notes that although the Act⁶⁷ does not expressly require tribunals to act inquisitorially that method of approach is implicit both in the principles of justice set out in Section 2 and in the means by which the Act requires the rule making powers it confers to be exercised.⁶⁸ Poynter identifies the inquisitorial nature of tribunals as the primary means by which the tribunal can act to reduce the gross inequality of arms inherent in disputes between the citizen and the state and highlights the tribunals’ responsibility to obtain as much relevant evidence as is reasonably available even where the appellant is represented.⁶⁹ The limits to which it is proper for tribunals to explore issues and the interplay between these limits and the standard of legal representation

⁶⁵ *R v Medical Appeal Tribunal (North Midland Region) ex parte Hubble* [1958] 2 QB 228

⁶⁶ *Kerr v Department for Social Development* [2004] UKHL 23, [2004] 1 WLR 1372

⁶⁷ Tribunals, Courts and Enforcement Act 2007

⁶⁸ A Bano, *Intervention: feat of balance*, *Tribunals Journal*, Spring 2012, p10

⁶⁹ R Poynter, ‘The Continuing Burden: Kerr and the overriding objective’ (2010) *Judicial Information Bulletin*

available to the appellant are discussed in an article which includes a quotation from Mr Justice Hickinbottom on the subject of poor representation:

Advocates may be inexperienced, or simply poor. A judge needs to have a temperament such that he is never seen to lose his temper, even in the face of ineptitude or ignorance of those before him.⁷⁰

This has relevancy for asylum appellants whom as we have seen are often poorly served by representatives, if represented at all.⁷¹ Poor legal representation is the subject of a paper by Burgess which highlights the risk faced by asylum appellants who are not infrequently failed by unscrupulous or disinterested legal representation.⁷² It is argued here that this lack of effective legal representation in asylum appeals makes the need for tribunals to adopt an enabling approach as a means to produce some equality of arms even more pressing. The Bench Book of Social Security Tribunals advises that to discharge the inquisitorial function the tribunal should assist parties to seek out the relevant facts and law before applying them.⁷³ Reference is made to a Commissioner's decision which put limits on the tribunals' duty in this respect and which highlights the appellants own responsibility adding "No doubt they (the tribunal) are entitled to initiate inquiries if they think fit. But it is a matter for their discretion and they are not bound to do so."⁷⁴ The initiation of enquiries at the discretion of the tribunal is central to the tribunals' inquisitorial function. In their guide to Social Security legislation Boner et al note that the intention of the overriding objective of the tribunal rules is not that of the Civil Procedure Rules, which is in part to strive to put parties on an equal footing, rather, as this may be judged unattainable in a Citizen v State legislation, provision is made to avoid unnecessary formality, to promote the enabling role and to consider proportionality rather than expressly consider resources.⁷⁵ In reference to the Industrial Tribunals (Constitutional Rules of Procedure) Regulations (Northern Ireland) 2005 Girvan LJ interpreted the importance of the overriding objective as being to inform the court and tribunals as to proper conduct of

⁷⁰ Leslie Cuthbert, From intervention to interfering, Tribunals Journal Spring 2011

⁷¹ Independent Asylum Commission 'Saving Sanctuary' (2008)

<<http://www.citizensforsanctuary.org.uk/pages/reports/SavingSanctuary.pdf>> accessed 23 September 2012 and Mr Justice Collins Lead Judge, Administrative Court, Foreword to 'Representation at Immigration Appeals, a Best Practice Guide'. Immigration Law Practitioners' Association December 2005 at page vii

⁷² Burgess (n56)

⁷³ HM Courts & Tribunals Service, Social Security and Child Support Tribunal, The Benchbook, Twelfth Edition (February 2012), Chapter 33

⁷⁴ Commissioner's decision *R (I)* 1/65 para 15

⁷⁵ Bonner D, *Social Security Legislation 2011/12, Volume III Administration, Adjudication and the European Dimension* (Sweet & Maxwell 2011). General notes to The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 at 5.158

proceedings.⁷⁶ Subsequent decisions of the Upper Tribunal have however taken the view that the over-riding objective would be unlikely in itself to dictate the decision of a tribunal considering whether to adjourn but would have the effect of freeing the tribunal from the binding effects of case law where the principles of that case law are not compatible with the overriding objective,⁷⁷ and that the over-riding objective reinforced a duty to deal with cases fairly and justly that already existed.⁷⁸ The inquisitorial and enabling approach adopted by Social Security and War Pensions tribunals, whether or not it arises from interpretation of the over-riding objective⁷⁹, is such that it results in practice whereby if the tribunal becomes aware that evidence which may support the appellants case could reasonably be made available but is absent, where that evidence may have a significant effect on the outcome of the appeal, and where adjourning to obtain that evidence with the delay that it will inevitably entail is considered proportionate to the issue to be decided, the tribunal is likely to adjourn and direct the production of such evidence even where the appellant bears the burden of proof and has had the opportunity to provide such evidence. Jacobs notes that this was the first opportunity that the Upper Tribunal had had to comment on the overriding objective in the Tribunal Procedure Rules,⁸⁰ and in particular, on its operation in relation to an application for an adjournment. Further, he went on to say that the tribunal when considering whether to adjourn a hearing using the overriding objective would focus its enquiries on three issues.⁸¹ These he identified as; the benefit of an adjournment, why the party was not ready to proceed and the impact of an adjournment on the other party and the tribunal service at large. If the reason for the adjournment was to obtain further evidence he considered that the tribunal would want to take into account the evidence it already had, the evidence it would be likely to obtain, the length of time it would take to obtain the evidence and whether the tribunal could use any other means to compensate for that lack of evidence. On considering the interests of the tribunal service as a whole he comments that it would surely be exceptional for an adjournment that would otherwise be granted to be refused solely on the account of the needs of the system as a whole. He also notes that the Secretary of State's only interest as a non-contentious party to the proceedings is in assisting the tribunal to ensure that it makes the correct decision on entitlement in fact and law. With regard to it being failure of performance on the part of

⁷⁶ *Peifer v Castlederg High School* (NICA) [2008] NICA 49

⁷⁷ *MA v SSWP* (UKAT (AAC)) [2009] UKAT 211 (AAC)

⁷⁸ *AT v SSWP (ESA)* (UKAT (AAC)) [2010] UKAT 430 (AAC)

⁷⁹ For a detailed discussion of this point see; Richard Poynter, *The Continuing Burden: Kerr and the overriding objective*, Judicial Information Bulletin HMCTS 52, 3

⁸⁰ Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, SI 2008/2685

⁸¹ *MA* (n77) at para.14

the appellant's representative which results in a request for an adjournment to seek further evidence a Commissioner had the following to say:

However in an environment where most representatives are not qualified lawyers and where most claimants are not paying for the services of their representatives, some care must be taken not to cause injustice to a claimant by visiting upon him the sins of his representatives. The tribunal's response must be proportionate, having regard to the consequences for the claimant of possibly losing his appeal.⁸²

In the decision of *Kerr* Baroness Hale said:

What emerges from all of this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.⁸³

The case of *Kerr* concerned an initial claim for benefit where the Secretary of State did not make use of documents in his possession to determine a salient fact prior to reaching his decision on Mr Kerr's entitlement to benefit, in this case a claim for funeral benefit. The nature of the case is therefore different from asylum appeals without medical evidence in that in *Kerr* the Secretary of State was already in possession of relevant evidence. It did draw from Baroness Hale however the much quoted description of the tribunal engaging in a co-operative process of investigation assisted by both parties - the process which this thesis argues is lacking in the current asylum appeals. Writing in a tribunal service journal Poynter states that since *Kerr* "the exercise of the inquisitorial jurisdiction becomes compulsory".⁸⁴

Since *Kerr* there have been a number of Upper Tribunal decisions which consider how the principles of *Kerr* might apply elsewhere. Levenson H considered the tribunal's exercise of judicial function where a claimant had relied on potentially misleading DWP information on entitlement to the mobility component of Disability Living Allowance.⁸⁵ Noting that the description of restriction on walking ability required to qualify for benefit indicated on

⁸² CIB/1009/2004 at para.14

⁸³ *Kerr v Department for Social Development* [2004] UKHL 23 [62]

⁸⁴ Speaking of a case arising from a claim for benefit in the Social Security and Child Support Chamber

⁸⁵ *JK v Secretary of State for Work and Pensions (DLA)* [2010] UKUT 197 (AAC)

DWP literature was at odds with the statutory test, and that this was the basis upon which the appellant had prepared her case, he said that tribunals should be alert to appellants being misled in this way and that that was one of the reasons for having an inquisitorial jurisdiction.⁸⁶ He also noted that it may only be when the appeal hearing stage is reached that a person may become aware of the statutory test to be met in exact terms and that that was a situation where the inquisitorial function of the tribunal is called upon to reduce the otherwise vast inequality of arms which would exist.⁸⁷ In the case of an asylum appeal an equivalent scenario would be that of an appellant who is unaware of the nature of evidence which is likely to be required to establish a “reasonable likelihood of risk” and whom therefore has not sought to substantiate past history of torture through submitting corroborating medical evidence.

In its current consultation on proposals for a new tribunal system for Scotland the Scottish Government notes that the rules of procedure in any judicial decision-making process can straddle the boundaries of the substantive law and are an important aspect of fairness.⁸⁸ In this document, which announces the formation of a new group, the Scottish Civil Justice Council, which is tasked with the development of a set of procedural rules for use across the new Scottish Tribunal System, the important part played by procedural rules in providing just decisions is recognised. The purpose of the rules is said to be to ensure that cases are decided justly by ensuring that cases are dealt with in a manner that is proportionate to their complexity and the importance of the issues raised, expeditious and fair. In that regard the rules are similar to those seen within most jurisdictions of the tribunals of HMCTs. However in this consultation document there is overt reference to the rules being required to put parties on an equal footing and it is the stated aim that the rules should facilitate active judicial intervention in appeals before the tribunal.

Vulnerable appellants and the enabling role of the tribunal

Torture survivors making asylum applications are unarguably vulnerable appellants who are inherently on an unequal footing with the other party a government department with vast resources at its disposal. Tribunal procedure rules must therefore promote practices which strive to provide some equality of arms in these appeals. There are no figures on how many asylum seekers have been tortured in their country of origin but the NGO Freedom from Torture estimates that it accepts between 6 and 9% of UK asylum seekers as

⁸⁶ *JK* (n85) [16]

⁸⁷ *JK* (n85) [23]

⁸⁸ Consultation on the Scottish Government’s Proposals for a new tribunal system for Scotland, Scottish Government <<http://www.scotland.gov.uk/Publications/2012/08/1747>> accessed 10th April 2012, p24

its clients⁸⁹ this does not though reflect the total percentage of asylum seekers who have been tortured as the organisation is unable to accept all the referrals made to it and in addition an unknown number of torture victims either do not disclose their history or do not find their way to the organisation's services. This therefore means that there is considerable likelihood that any asylum seeker before a tribunal has been the victim of torture. This requires that the tribunal adopt an overtly enabling role in all asylum appeals and consider using all the powers conferred by its procedural rules to ensure as much equality of arms in the proceedings as possible.

The vulnerable witness guidance produced by the Asylum and Immigration Chamber,⁹⁰ based on guidance issued by the Senior President of Tribunals,⁹¹ reveals little reference to experience of torture as a cause of vulnerability.⁹² The document gives helpful advice regarding dealing with vulnerable appellants generally but has a surprising emphasis on situations which are much less likely to present in asylum appeals than torture.⁹³ The impression gained from this document is that it has been heavily adapted from one produced for other purposes rather than written specifically with the needs of asylum appellants in mind. In contrast, it is of note that the Immigration and Refugee Board of Canada, whose documents are often referred to by the Immigration and Asylum Chamber in its own documents, has produced, in addition to *Guidelines on procedure with respect to vulnerable appellants*,⁹⁴ an extensive training manual on victims of torture for use by its adjudicators.⁹⁵ The Canadian guidance places heavy emphasis on the needs of torture victims in asylum appeals. The UK vulnerable witness guidance, as we have seen, does not, but where such a torture survivor is recognised as a vulnerable witness the guidance does support the argument in this thesis recognising as it does the tribunals responsibilities

⁸⁹ Amnesty International 'Get it Right' (2004) p30

<http://www.amnesty.org.uk/uploads/documents/doc_15239.pdf> accessed 17th October 2012

⁹⁰ Joint Presidential Guidance Note No 2 of 2010: Child vulnerable adult and sensitive appellant guidance, Lord Justice Carnwath, Senior President of Tribunal, 30 October 2008

⁹¹ Practice Direction First Tier and Upper Tribunal Child Vulnerable Adult and Sensitive Witnesses, Lord Justice Carnwath, Senior President of Tribunals, 2008

⁹² Torture does not appear in the 5 headline factors to be taken into account by immigration judges when assessing vulnerability; torture does not feature in the 10 elements which identify vulnerable adults in the safeguarding Vulnerable Adults Act which are quoted; torture is mentioned only as an additional footnote with the acknowledgement that some individuals may be vulnerable because of events that have happened to them.

⁹³ such as special needs (at 10.2 ix, x, xi)

⁹⁴ Immigration Refugee Board, Canada (IRB), *Guideline on Procedures with respect to vulnerable persons appearing before the IRB*(2006) < <http://www.irb-cisr.gc.ca/eng/brdcom/references/pol/guidir/Pages/vulnerable.aspx>>accessed 24 September 2012

⁹⁵ Refugee Protection Division Professional Development Branch (IRB) *Training manual on Victims of Torture* (2004) <<http://www.irb-cisr.gc.ca/Eng/tribunal/rpdspr/victorture/Pages/index.aspx>> accessed 25 September 2012

to take an active part in proceedings. It recognises that although the primary responsibility for identifying vulnerable adults rests with the party calling them, representatives may fail in this regard. The guidance asks tribunals to consider whether an adjournment would be appropriate to enable either party to obtain expert evidence e.g. on mental health. It reminds the tribunal of the need to avoid unnecessary re-traumatisation of a victim of torture. Most importantly it suggests that if an appellant is identified as a vulnerable witness during the course of the hearing an adjournment may be necessary to enable expert evidence to be called as to the effect of this on the individual's ability to give cogent evidence. On assessing the evidence the guidance reminds judges that the order and manner in which evidence is given may be affected by psychological trauma. On determination the guidance states that where there are discrepancies in the oral evidence the extent to which vulnerability or sensitivity of the witness plays a part in that must be considered and crucially states that the decision should record whether the tribunal has concluded that the appellant is a vulnerable or sensitive adult and the effect that the tribunal considered that vulnerability had in assessing the evidence before it. The Canadian vulnerable witness guidance makes it clear that it is the responsibility of the tribunal to identify vulnerable persons and to take proper procedural steps before a view on credibility is taken.⁹⁶ It states that medical evidence is of great value in this regard and in identifying impact on testimony and recommends that the tribunal might suggest that medical evidence be produced. Unfortunately research reviewed in the introductory chapter to this thesis reveals little evidence of the tribunal guidance on vulnerable witnesses being followed and personal communication suggests that there is a low level of awareness of this guidance in the tribunal.^{97 98}

The approach recommended in the vulnerable witness guidance, if followed, would improve fairness in these appeals through promoting a proper evaluation of the appellant's evidence and open reasoning as to why inconsistencies and gaps in memory were not thought to be due to the effects of torture. Research reviewed in the introductory chapter to this thesis criticises immigration judges approach to the task of assessment of credibility and did not suggest that this guidance was being followed. The Independent Asylum

⁹⁶ IRB Guideline on Procedures (n94)

⁹⁷ Body of evidence (n40)

⁹⁸ Personal communication 14th July 2011

Commission amongst others has called for adequate guidance to be given to immigration judges on assessing the credibility of appellants in asylum appeals.⁹⁹

International Norms

Another factor is the extent to which the tribunal meets international expectations and legal obligations. These arise from a number of sources: there is the “soft law” or standard setting undertaken by bodies such as the United Nations High Commissioner for Refugees (UNHCR) and international legal obligations assumed by the UK under both the Refugee Convention¹⁰⁰ and more importantly under the ECHR.¹⁰¹

The thrust of ‘soft law’ is clear. In the UNHCR handbook on procedures and criteria for determining refugee status it is concluded that the determination of refugee status is not a mechanical process but one which requires, in addition to specialised knowledge, understanding of the human factors involved in the particular situation of individual appellants.¹⁰² As will be seen in chapter three, in the detailed discussion of the effects of torture, it is precisely those human factors in asylum appeals of traumatised appellants which are currently being overlooked and which are leading in part to unjust decisions. The remedy in large part is for the tribunal to adopt an enabling and inquisitorial approach. The increased interaction arising between appellant and tribunal assists in clarification of the facts of the case through increased understanding of the human factors at play in the appeal. The handbook further provides that effective national remedies (scope of review against a negative decision by the government department) must provide for rigorous scrutiny of challenges to negative decisions on asylum claims which should encompass a review of both facts and law.¹⁰³ The UNHCR has expressed concern where national remedies rely on legal advisers to raise legal arguments and present relevant evidence in a context where it is recognised that access to competent legal assistance is limited, and has recommended that appeal authorities should have the power to instigate fact-finding if

⁹⁹ Independent Asylum Commission, “Fit for Purpose yet?” (2008), 41
<<http://www.independentasylumcommission.org.uk/files/Fit%20for%20Purpose%20Yet.pdf>>accessed 25 September 2012

¹⁰⁰ UN *Convention Relating to the Status of Refugees* 1951

¹⁰¹ ECHR (n5)

¹⁰² UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979) at para. 22

¹⁰³ UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice- Detailed Research on Key Asylum Procedures Directive Provisions* (2010) at para.16, The right to an effective remedy; Scope of the review.

necessary.¹⁰⁴ The handbook, acknowledging that the burden of proof lies with the claimant,¹⁰⁵ explains that it is in the nature of asylum claims for there to be little if any evidence available to the individual to corroborate statements and asserts that therefore the applicant and examiner share the responsibility to ascertain and evaluate all relevant facts and goes as far as saying that it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.¹⁰⁶

This international guideline is at pains to emphasise the barriers that these vulnerable appellants face in presenting their case and in particular the difficulties they face providing documentary evidence to “prove” every part of their case and the need therefore to ensure that the correct standard of proof is applied and that they are given the benefit of the doubt where appropriate. In particular, in recognition of the sometimes desperate circumstances of this particular group of applicants it is noted that untrue statements, even where shown to be so, are not by themselves a reason to refuse refugee status. The responsibility to take action to ascertain all the facts and fully take account of the human factors at play in these appeals is therefore raised not only by expectations within the domestic unified tribunal service but also by the UNHCR.

All of this is reflected in legally-binding international obligations assumed by the UK. In particular, the positive obligation to seek evidence of potential past ill-treatment arises under the European Court of Human Rights, as indicated by the Strasbourg Court in *RC v Sweden* where the court identified the responsibility of the state or the appellate courts to ascertain all relevant facts:

In the Court's view, the Migration Board ought to have directed that an expert opinion be obtained as to the probable cause of the applicant's scars in circumstances where he had made out a prima facie case as to their origin. It did not do so and neither did the appellate courts. While the burden of proof, in principle, rests on the applicant, the Court disagrees with the Government's view that it was incumbent upon him to produce such expert opinion. In cases such as the present one, the State

¹⁰⁴ *Handbook on Procedures* (n102) at para.16: The right to an effective remedy; Evidence and Fact Finding

¹⁰⁵ *Handbook on Procedures* (n102) at para.196

¹⁰⁶ The handbook also acknowledges that some statements are not susceptible of proof and says that in those instances, where the applicant's account appears credible, the applicant should, unless there are good reasons to the contrary, be given the benefit of the doubt.

has a duty to ascertain all relevant facts, particularly in circumstances where there is a strong indication that an applicant's injuries may have been caused by torture.¹⁰⁷

It is thus simply no longer enough to defend the adversarial approach in tribunal practice through pointing to the appellant's right to have representation.

In *Auad v Bulgaria*¹⁰⁸ the Strasbourg Court held that Article 13, which guarantees effective remedy, had been violated as rigorous scrutiny of the claim of substantial grounds for fearing a real risk had not been undertaken and there was no procedure whereby the applicant could challenge the authorities' assessment of his claims.¹⁰⁹ Although the UK is not required to provide a right to asylum as such, it is required to provide a right to seek asylum through provision of a decision making process which will consider; eligibility to Refugee Status under the Refugee Convention,¹¹⁰ failing that qualification for humanitarian protection under the European Directive,¹¹¹ failing that whether removal would be a breach of human rights under the European Convention on Human Rights, most commonly Article 3,¹¹² but also potentially Article 6,¹¹³ or Article 8.¹¹⁴ Decision making on these grounds is complex and domestic case law has built up in this jurisdiction informed by developments in national legislation, international law under the Refugee Convention, European Union and European human rights law particularly under Article 3. The duty under the Human Rights Act to "take into account" the Strasbourg jurisprudence has been interpreted as meaning that, in the absence of some special circumstance, any

¹⁰⁷ *R.C.v.Sweden* App no. 41827/07 (ECHR 9 March 2010); an Iranian applicant asserted that he had escaped detention and torture and had scars on his body as a result of torture, this was disbelieved by the Swedish authorities who rejected his application for asylum; whilst acknowledging that it is national authorities who are best placed to assess facts and credibility the ECHR disagreed with the findings of the Swedish authority on the applicant's credibility.

¹⁰⁸ *Auad v. Bulgaria* App no. 46390/10 (ECHR, 11 October 2011)

¹⁰⁹ European Convention on Human Rights Article 13; The notion of an effective remedy in cases where the applicant has made an arguable claim that he would be subjected to proscribed treatment if deported has two component: close, independent and rigorous scrutiny of the claim that substantial grounds for fearing a real risk of proscribed treatment existed; and access to a remedy with automatic suspensive effect

¹¹⁰ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137 Art 1A(2)

¹¹¹ Refugee or Person in Need of International Protection (Qualification) Regulations 2006, SI 2006/2525

¹¹² Under Article 3 ECHR it is unlawful to remove an individual to a place where he may face real risk of torture or inhuman or degrading treatment, Article 3 possesses an "extra-territorial effect"-it may be invoked where the risk of serious ill treatment would occur in the receiving state, and because of the disparate nature of Article 3 claims case law from the higher courts now informs decision making in specific types of claims for example those involving access to medical treatment and suicide risk

¹¹³ Article 6 ECHR, the right to a fair trial, will only apply where the tribunal is satisfied that the receiving country would act in flagrant denial or gross violation of this right

¹¹⁴ Article 8 ECHR, right to family life, may apply where it can be shown that family life, which has been established in the UK, cannot reasonably be expected to be enjoyed elsewhere

clear and constant jurisprudence of the Strasbourg Court should be followed.¹¹⁵ In this way remedy is available in the domestic courts without the need for recourse to Strasbourg. The jurisprudence which is of concern in this thesis is around procedure in the asylum tribunal and in particular the tribunals' responsibility with regard to assisting the appellant in accessing its procedures and presenting their case effectively.

The key issue is therefore the obligation under Article 3 of the ECHR, a standard which itself is reflected in the guidance given by the UNHCR. In all cases of European Union (EU) citizens where European Union rights are at stake however the issue of effective judicial protection falls to be considered as a result of the development of the principle of effective judicial protection by the European Court of Justice.¹¹⁶ This general principle is reiterated at Article 14 of the EU Charter of Fundamental Rights, legally enforceable following the Lisbon Treaty, which states that everyone whose EU rights and freedoms are violated has the right to an effective remedy before a tribunal.¹¹⁷ The Lisbon Treaty itself states that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union Law. That this can be held to extend to First-tier tribunal procedure in asylum appeals is supported by the Procedure Directive which states that member states shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal.¹¹⁸ It is argued in this thesis that "effective remedy" before a tribunal where the appellant is vulnerable, has language barriers to overcome, is often poorly represented and is traumatised is not met by the current adversarial system employed by the Immigration and Asylum Chamber and requires that the tribunal adopt an enabling and inquisitorial role in asylum appeals. Where the appellant has been the victim of torture it is not sufficient for the tribunal to rely on an examination of the facts without considering whether the appellant has been able to present their case effectively with or without legal representation. This is of particular consequence in a jurisdiction where the only route of appeal is on error of law and the consequences of an inaccurate decision potentially dire.

¹¹⁵ As Lord Rodger stated in the *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 "Argentorum locutum, iudicium finitum; Strasbourg has spoken, the case is closed"; R Reed and J Murdoch, *A Guide to Human Rights Law in Scotland* (2nd edn, Tottel, 2011) p v

¹¹⁶ Sarah Craig and Maria Fletcher, "The Supervision of Immigration and Asylum Appeals in the UK-Taking Stock" [2012] *International Journal of Refugee Law* Vol. 24 No. 1 60

¹¹⁷ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, TEU2007/C 306/01, Article 19(1)

¹¹⁸ Council Directive 2005/85/EC 2005 on minimum standards on procedures in Member States for granting and withdrawing Refugee Status [2005] OJL 326/13

In short, individuals who have been tortured and are at risk of future persecution in their country of origin must be protected against enforced return to that country.¹¹⁹ In the United Kingdom the first line of protection after decision making by the UKBA is the tribunal system. Decision making by the UKBA has been criticised,¹²⁰ and it is essential therefore that appellants are able to rely on the tribunal to provide protection from the danger of being returned to their country of origin to face persecution. The current system cannot be said to allow appellants to fully participate and tribunals are not stepping forward to compensate for poorly represented vulnerable appellants. Appellants in this jurisdiction are amongst the most vulnerable of all amongst us and the judiciary is letting applicants down by failing to discharge its positive obligation to protect the vulnerable against the executive. The Leggatt report makes the clear recommendation that tribunals adopt an enabling approach and this expectation that tribunals act in an inquisitorial fashion is now also part of the UK's international obligations.

The following chapter examines the ethos of the tribunal further by analysing its approach to medical experts and their reports in some depth, after outlining the importance of understanding the medical aspects of these appeals. This builds a picture of multiple elements of the current asylum appeals process act synergistically to significantly disadvantage torture survivors attempting to access justice in UK tribunals.

¹¹⁹ Convention Relating to the Status of Refugees [1951] No 2545, Art 33 Prohibition of expulsion or return ("refoulment")

¹²⁰ The Independent Asylum Commission's Interim Findings IAC, *Fit for Purpose Yet*, March 2008, 112 Cavell St, London page 19

This thesis has shown that there are grounds for real concern that asylum appeal tribunals do not always provide the protection for appellants against adverse decisions of the state that is required of them. Research reviewed in that chapter has shown that assessment of credibility by the tribunal is inconsistent and on occasion is based on factors which have been discredited as indicators of credibility, such as late disclosure in cases of rape. Further research discussed in this thesis has found that no clearly discernible or adequate methodology for the assessment of credibility within the tribunal can be said to be employed. Crucial findings of fact are the responsibility of tribunals and tribunals should be looking at the decision afresh rather than reviewing the earlier decision of the UKBA. However this thesis has shown a serious failure by the tribunal to live up to its responsibilities to establish the facts of the case by acting in an inquisitorial and enabling manner. Throughout this thesis it is argued that this expert fact finding body does not have the tools, the attitude or the membership to safely answer the difficult and crucial questions it is called upon to answer. Having considered the adversarial approach of asylum appeal tribunals in the preceding chapter this chapter turns to consider the effective use of medical evidence and expertise in asylum appeals.

International Guidelines

Medical evidence serves a number of important functions in asylum appeals and there are a number of influential international guidelines which direct its use in these appeals. Recent guidance on the correct approach to medical evidence in asylum appeals has been produced by the International Association of Refugee Law Judges (IARLJ) and the extent to which this guidance is followed will be considered further in this chapter.¹²¹ The Istanbul Protocol (IP) sets out the standard for medical reports supporting an application for asylum in a third country where there has been an allegation of past torture or ill treatment.¹²² In terms of the documentation and evaluation of specific forms of torture, the IP gives detailed guidance. Terms with specific definitions are recommended to the medical examiner to express the degree of consistency between the lesion found and attribution given by the subject of the report. In addition a psychological evaluation is carried out with comment on ICD- 10¹²³ or DSM-IV¹²⁴ diagnosis if relevant.¹²⁵

¹²¹ International Association of Refugee Law Judges' Guidelines on the Judicial Approach to Expert Medical Evidence 2010, hereafter IARLJ Guidance on expert medical evidence.

¹²² Istanbul Protocol (n52)

¹²³ International Statistical Classification of Diseases and Related Health Problems 10th Revision World Health Organisation: is the standard diagnostic tool for epidemiology, health management and clinical

Even in those appeals where past history of torture is not disputed medical evidence is of value as it will inform the tribunal of the existence of psychological sequelae of trauma and the likely effect of that sequelae on the appellants ability to give a consistent, comprehensive, chronological account of detention and torture. In addition the medical report may provide a reason for late disclosure of torture or late asylum application based on knowledge of behaviour resulting from particular types of trauma. As we have seen in the introductory chapter to this thesis late disclosure of rape without the support of medical evidence may cause a negative view on credibility to be taken. Such inappropriate adverse findings on credibility may have devastating effect on the outcome of the appeal. This thesis proposes that medical evidence should be available in all asylum appeals where the appellant discloses a history of torture either prior to or during the appeal hearing and argues that the tribunal shares the responsibility to ascertain all the relevant facts.¹²⁶ A recent case illustrates the potential power of medical evidence.¹²⁷

Guidelines published in 2010 by the IARLJ are designed to assist judges and quasi-judicial decision makers in the proper evaluation of expert medical evidence.¹²⁸ The IARLJ identified six main purposes served by medical evidence in asylum appeals; to substantiate claims of ill-treatment; to establish a correlation between physical or psychological injuries and the alleged torture or ill-treatment; to explain a claimant's difficulties in giving evidence or recounting events by (a) providing possible explanation(s) for inconsistencies

purposes and is used to classify diseases and other health problems on vital records including death certificates and health records.

¹²⁴ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th Edn, American Psychiatric Pub, 2000): covers all mental health disorders for both children and adults, lists known causes, statistics in terms of gender, age at onset, and prognosis as well as research concerning treatment.

¹²⁵ The Istanbul Protocol (n52) para.187 requires that the medical examiner consider other possible causes of any physical evidence found, comment on the relationship between psychological state and the account of torture and give a reasoned analysis of the findings in reaching a justified opinion. Without this the medical report will be of little value to the court but the medical examiner must be able to recognise and avoid stepping over the boundary between expressing an opinion on the medical findings as evidence of torture which is required of him or her and being seen to express a view on the appellant's overall credibility. Doing so has resulted in the medical report being dismissed in its entirety.

¹²⁶ UNHCR handbook (n102) para.196

¹²⁷ *R (on the application of AM) v Secretary of State for the Home Department* [2012] EWCA Civ. 521.

Whether expert evidence relied upon by an asylum seeker amounted to "independent evidence of torture" in the context of a claim against wrongful imprisonment by the Home Office. The judge hearing the first appeal without medical evidence had concluded that the appellant was totally lacking in credibility. The immigration judge on the subsequent appeal, where medical evidence was available, concluded that the appellant had been detained, raped and tortured as claimed. This case illustrates the power of medical evidence in these cases and also demonstrates the importance of recognising late disclosure as a feature of sexual torture. This case suggests that there should be a high index of suspicion that torture has occurred in all cases where an asylum seeker has been held in detention in their country of origin and consideration should be given to obtaining medical evidence in these cases.

¹²⁸ IARLJ Guidelines on expert medical evidence (n121)

and/or contradictions within a claimant's narrative of events;(b) providing possible explanation(s) for reticence or reluctance in divulging a full account of events, for example delay in divulging allegations of sexual assault and/or other forms of violence directed against an individual; to address the possible effect of removal and return to the country of origin upon a person's physical or mental well-being or that of a family member; to assess treatment needs; to reduce the need for the claimant to give testimony about traumatic events.¹²⁹

To assess and report on the degree of consistency between examination findings and given attribution, the author will use the terms of the IP. The IP contains internationally recognised standards for the effective examination, investigation and reporting of allegations of torture and ill treatment.¹³⁰ It is of note that this document, the use of which is promoted by the UN, was primarily aimed at prevention of further torture through holding perpetrators more effectively to account for their offences by the effective and standardised documentation of torture. It is now however commonly used in refugee status determination procedures. The multi-purpose role of the IP is important and recognised at paragraph 92 of the document where the standards for reports in different situations are laid out and where reports in support of an application for asylum in a third country are said to require only a "relatively low level of proof of torture" as opposed to the much more stringent requirement of "the highest level of proof" in proceedings which might

¹²⁹ David Rhys Jones, Sally Verity Smith, "Medical Evidence in asylum and human rights appeals" [2004] Int J Refugee Law 16(3). An author of the IARLJ guidelines expands the purpose served by the documentation of torture during a claim to asylum to include issues of wider public interest such as bearing witness to the atrocity which has been committed both in the interests of the individual's rehabilitation from the effects of torture and in facilitating protection of others from future human rights abuses by the effective documentation of past torture. An example of this taking effect is the systematic review of medico-legal reports of Sri Lankan clients undertaken by a NGO which resulted in the publication of 'Out of the Silence: New Evidence of Ongoing Torture in Sri Lanka 2009-2011' [2011] Freedom from Torture, Medical Foundation for the Care of Victims of Torture, London

¹³⁰ The Istanbul Protocol (n52) para.187, requires that the author use the following terms in assessing the degree of consistency between the lesion, or pattern of lesions, and the attribution given; (a) Not consistent: the lesion could not have been caused by the trauma described;(b) Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;(c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;(d) Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;(e) Diagnostic of: this appearance could not have been caused in any way other than that described. The IP provides detailed advice on the documentation of torture and the weight which will be given to the MLR is heavily dependent upon the extent to which it conforms to the terms of the Protocol and is referenced to it. Particular paragraphs are often used as footnotes in MLRs to substantiate the writer's conclusions, such as that the overall pattern of scarring can be more informative than the assessment of individual scars. "Ultimately, it is the overall evaluation of all lesions and not the consistency of each lesion with a particular form of torture that is important in assessing the torture story." Istanbul Protocol para.188.

result in trial of an alleged perpetrator.¹³¹ The IP also recognises the importance of psychological sequelae of torture and recommends that a psychological evaluation be carried out with identification of psychiatric diagnosis where appropriate. Where the diagnostic criteria are fulfilled the relevant diagnosis in either the DSM-1V¹³² or ICD-10¹³³ should be identified. The purpose again is to assess the degree of consistency between an individual's account of torture and the psychological findings having regard to assessment of social function as well as clinical impression based on observation and personal history.

The medical expert in producing a medico legal report is called upon to undertake an evaluation objectively and impartially and through using professional experience and all the information available to reach a view on the consistency of the findings with the account of torture given. In doing this the doctor will not assess credibility but will assess the account given critically in the light of the forensic findings, observed emotional responses and known sequelae of physical and psychological trauma and illness. Unfortunately despite adherence to this internationally recognised methodology research reviewed in this thesis shows that some IJs effectively discount expert medical evidence as being no more than the uncritical acceptance by the doctor of the appellant's account where that judge is inclined to disbelieve the appellant's account.

Beyond interpretation of scarring the second major purpose served by medical evidence in asylum appeals is providing an opinion on any psychological sequelae of torture and its effect on the appellant's ability to give testimony. This is recognised in the IARLJ guidance which states that an expert medical report may be able to provide a possible explanation for inconsistencies and/or contradictions within a claimant's narrative of events, and provide possible explanation for reticence or reluctance in divulging a full account of events. The testimony of the appellant can then be properly evaluated in the light of that knowledge.

As this is a cross disciplinary thesis the opportunity is now taken to consider the effect of torture on the ability to give testimony in some detail. Firstly scientific understanding of normal memory and traumatic memory and the implications for asylum appeals are reviewed. Secondly the effects of psychiatric illness on the ability to engage effectively

¹³¹ Research reviewed in this thesis reveals that IJ's are not abiding by guidance that in applications for asylum only a relatively low level of proof of torture should be required as medical reports which contain references to multiple scars regarded by the medical experts writing the reports as typical of or highly consistent with torture have been regarded by IJ's as insufficient to establish a history of torture.

¹³² Diagnostic or Statistical Manual of Mental Disorders (n124)

¹³³ International Statistical Classification of Diseases and Related Health Problems (n123)

with the asylum appeal process will be examined. Thirdly physical injury and its impact on memory and testimony giving is considered briefly. Fourthly, and lastly, the impact of rape and sexual torture in asylum appeals is evaluated.

Scientific understanding of normal memory and traumatic memory: implications for asylum appeals

Normal memory has limitations and the British Psychological Society has produced guidelines which demonstrate a number of key points judges should be aware of when evaluating evidence.¹³⁴ Briefly they describe that human memory is complex and is composed not only of actual experienced events but also of the knowledge of that person's life, known as autobiographical memory, that knowledge of a person's life being stronger than that of memory of specific experienced events. In this way human memory differs significantly from recording media such as video. Human memory has three distinct functions all of which require to be intact; laying down memory, storage of memories and recall. "Remembering" is a process distinct from laying down and storing memories and is an act of reconstruction whereby different types of knowledge are brought together and is prone to error and influenced by the recall environment. Memories of events are always incomplete, accounts of memories which do not feature forgetting or gaps are highly unusual and it follows that incomplete memories should not be construed as an indicator of fabrication. In fact a high degree of very specific detail in long term memory is unusual and recollection of time and date in particular is often poor as is precise recall of spoken conversations. Recall of highly specific detail does not guarantee that a memory is accurate or that the event occurred. In general the only way to establish the truth of a memory is with independent corroborating evidence. The content of a memory arises from an individual's conscious and unconscious comprehension of an experience and can be further modified and changed by subsequent recall. People can "remember" an event which they have not actually experienced; this is not necessarily fabrication but results from the "memory" of an event that was originally imagined or through the blending of a number of memories or through the effects of memory needing to make personal sense to the individual. It can be seen therefore that "normal" memory is far from straightforward and judges will have to be aware of the limitations of normal memory when evaluating evidence. This is particularly significant in asylum appeals where evaluation of the appellant's account is often critical in the absence of any corroborating evidence. Evaluation of "normal" memory is therefore a difficult task for tribunals. It will be shown

¹³⁴ The British Psychological Society, Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory, Research Board, July 2008, 4.

next that evaluation of traumatic memories, the substance of most asylum claims, is an even greater challenge.

Traumatic memories are different in a number of respects from memories formed from non-traumatic events and all recounting of detention or torture will involve recall of traumatic memories. Unlike normal memories which we all have and which we may all feel able to assess (albeit erroneously if we are unaware of the limitations outlined in the paragraph above) traumatic memories are fortunately not something which all members of society have. There is therefore less understanding of the nature of traumatic memories and greater need for expert evidence on this subject to guide the tribunal in its evaluation of evidence. Medical evidence can provide that guidance in individual appeals. Memories of traumatic events are fragmentary and consist largely of sensory impressions without a verbal narrative. This makes it difficult for the traumatised witness to produce a chronological account of traumatic events as may be expected by the tribunal. If a memory is held as a collection of fragmentary sensory impressions it cannot always be put together in chronological order. It is more likely that the torture, which may have continued over a considerable length of time, will be remembered as several key moments, typically the worst moments experienced. In addition as the memories are fragmented they may be recalled in a jumbled order. The order they are recalled in may also vary overtime as recall of traumatic memories tend to be triggered by events during the interview process rather than being recalled consciously at will. Thus the sequencing of traumatic memories is affected. Detail of traumatic memories is also affected. A classic experiment by Loftus and Burns showed that the type of details of an event which can be recalled depended upon the nature of the event.¹³⁵ Their experiment demonstrated that a mentally shocking episode, not merely an unexpected episode, caused poorer retention of other peripheral details by subjects. They postulated that this was due to disruption of the lingering processes necessary for full storage of information as memory. Thus where a traumatic event has occurred there may be focus on the details of central events to the dereliction of attention to details of peripheral events. This is significant in asylum appeals where the ability to recount peripheral details of circumstances of detention, such as dimensions of the cell or form of lighting, has traditionally been used as a measure of veracity. This experiment also showed that retrograde amnesia could occur in the absence of recognised causes of such amnesia, notably head injury, merely through exposure to shock of the event itself. This is again of significance in asylum appeals where details of arrest or capture prior to detention

¹³⁵ Loftus, E.F. and Burns, T.E. (1982) 'Mental shock can produce retrograde amnesia', *Memory and Cognition* 10:318–23

and torture are often sought and inconsistencies or gaps in accounts of such events prior to the torture experience regarded as indicative of fabrication.

Investigation into the consistency of autobiographical memory where there has been exposure to traumatic events was undertaken by Herlihy et al through repeated interviews with Kosovan Albanians and Bosnians who had come to the UK under a UN sponsored programme and who had no obvious motivation to deceive.¹³⁶ This demonstrated that discrepancies arose between two accounts of the same event where there was no apparent motivation for fabrication. In this study subjects were interviewed repeatedly and accounts of the same events taken. Discrepancies including the provision of previously unavailable detail in autobiographical accounts given up to seven months apart were found. This study lends support to the contention that inconsistent recall and the recall of additional detail should not be taken as evidence that appellants in asylum appeals are fabricating their accounts.¹³⁷ The final finding of this research was consistent with that of Loftus and Burns in that interviewee's were most likely to be inconsistent in details they rate as peripheral as opposed to central to events.

This research has been further supported by recent American military research into the effect of stressful interrogation, sleep and food deprivation on the subject's ability to identify their interrogator.¹³⁸ The authors of this research undertaken on military subjects found that the ability to identify suspects was compromised by experience of highly stressful compared to moderately stressful events and commented that their research data raises the possibility that other types of stress induced memory deficits (such as narrative memory deficits) may also exist. Stressful interrogation, sleep and food deprivation are conditions which have commonly been endured in detention by victims of torture and therefore the findings of this research that highly stressful events have a demonstrable

¹³⁶ Herlihy J, Crag P, Turner S. Discrepancies in autobiographical memories: implications for the assessment of asylum seekers: repeated interviews study [2002] *British Medical Journal*; 324:324-7

¹³⁷ This study has particular application in asylum appeals as those subjects in the study with Post Traumatic Stress Disorder (PTSD) demonstrated greater discrepancies with increased interval between interviews. The research did not have the capacity to provide the reason for these discrepancies, merely to show that such discrepancies are likely to occur in traumatised subjects particularly if they have PTSD and should not be taken in themselves as an indication of intent to deceive nor as an indication that the recounted events did not occur. This is of particular relevance in asylum appeals as many appellants have severe PTSD as a result of torture and particularly rape and sexual torture and statements may be given over a protracted time in the course of the asylum determination process.

¹³⁸ Morgan C A 3rd, Hazlett G, Doran A, Garrett S, Hoyt G, Thomas P et al, 'Accuracy of eyewitness memory for persons encountered during exposure to highly intense stress' [2004] *Int J Law Psychiatry*; 27: 265-79

effect on memory is of great significance in the proper evaluation of appellants evidence in asylum appeals.¹³⁹

A further study examining change in retold stories investigating change in personal memory on subsequent recalls was undertaken by Anderson, Cohen and Taylor in 2000.¹⁴⁰ This study found that accounts of recent memories varied more than older memories suggesting that with time what is initially a reconstructive mechanism of recall liable to variation becomes a reproductive mechanism where the account which is given arises from an increasingly fixed memory, the account thereby being more consistent. This study was undertaken using recall of everyday events in the subjects' autobiographical memory and found that less than 50% of the facts given in the second account were identical to the first in individuals who had nothing to gain from changing their account. The authors conclude that repeated interviewing is likely to yield new additional information and that the study findings have practical implications for witness testimony and medical history-taking in asylum appeals where immigration judges have sometimes viewed additional information disclosed to medical experts with suspicion and as evidence of inconsistency in testimony. This research demonstrates that recall of additional information is to be expected with repeated retelling of events such as occurs in the asylum appeal process and it should not be regarded as an indication that the story is being fabricated.

In summary then review of research and scientific literature on the nature of memory and in particular traumatic memory reveals that memory of traumatic of events such as torture can be expected to have gaps and to be lacking in peripheral detail. It is to be expected that extreme traumatic events such as torture will be recounted in a disjointed inconsistent fashion and that the victim will have difficulty forming their memories in to a narrative for the benefit of retelling. It is also not unexpected for additional information to be added to the account at later retellings. Scientific research and literature shows that it would be incorrect to point to any of these features as evidence of fabrication of an account of torture in an asylum appeal and yet these are the very features which are regularly relied upon by IJ's to support findings that appellants lack credibility. This is of particular

¹³⁹ A possible physiological mechanism for the effect of stress on memory is through raised levels of cortisol, a gluco-corticoid known to be produced by the body when under stress. Newcomer, J W, Selke, G, Melson, A K, et al, 'Decreased memory performance in healthy humans induced by stress-level cortisol treatment'[1999] Arch General Psychiatry 56: 527-33 showed that administering doses of cortisol to simulate major stress in a double blind randomised placebo controlled study produced reversible reduction in verbal declarative memory without effects on non-verbal memory or attention. They concluded that this demonstrates a direct effect of stress on the ability to encode and retrieve memories.

¹⁴⁰ Anderson S, Cohen G and Taylor S. Rewriting the past: Some factors affecting the variability of personal memories, [2000] Applied Cognitive Psychology, 14(5), pp.435-454

significance, as we have seen such adverse findings on credibility are likely to be fatal in asylum appeals.

The effect of psychiatric illnesses: implications for asylum appeals

Psychiatric illness is a common consequence of torture and is therefore relevant to any discussion of asylum appellants with a history of torture. Various psychiatric illnesses occur as a result of traumatic experiences. Of these, Post-Traumatic Stress Disorder (PTSD) is probably the best known.¹⁴¹ One study found almost 50% of its sample of asylum seekers in London to have PTSD using the internationally agreed diagnostic criteria.¹⁴² PTSD has many features which interfere with laying down and retrieving memories and with the ability to give a coherent account of trauma and is therefore of great significance in asylum appeals. Features of PTSD which adversely affect an individual's ability to engage with the tribunal are; limitations of memory of the traumatic event itself as outlined above; lack of concentration, irritability, emotional flattening, social withdrawal and hypervigilance - all of which interfere with the appellant's ability to communicate; avoidance behaviour, distressing recall, intrusive memories in the form of reliving phenomena such as flashbacks and dissociative amnesia - features which make recall of events for the purposes of giving testimony very difficult; insomnia and sleep deprivation, marked sleep disturbance due to nightmares and inability to sleep during the hours of darkness - causes impaired cognition and recall. Further discussion of PTSD is included below in the section on rape and sexual torture. Depression may occur as a standalone condition or may co-exist with PTSD, the classic features of depression, along with low mood and apathy, are loss of ability to concentrate and reduced memory. Major depression as is seen in this group of appellants significantly affects working memory and will also therefore impact on the appellant's interaction with the tribunal.

Thus it can be seen that the ability of torture survivors to take part effectively in the asylum appeals process is likely to be impeded by the nature of traumatic memories, the effect of psychiatric sequelae of torture such as PTSD, depression and sleep deprivation. This is in addition to existing cultural and language barriers and may be compounded by the effects of chronic pain syndromes and physical injury, considered next.

¹⁴¹ The ICD-10 Classification of Mental and Behavioural Disorders: Clinical descriptions and diagnostic guidelines (World Health Organisation 2004) p 147, F43.1

¹⁴² R R, 'Psychiatric morbidity in survivors of organised state violence including torture. A retrospective series.' [1993] 162 British Journal of Psychiatry 55

The effect of physical injuries and illness: implications for asylum appeals

Any severe debilitating and chronically painful illness can affect memory as can many drugs used to treat such conditions.¹⁴³ Chronic Pain Syndrome is an important feature of torture survivors and is a complex diagnosis recognised as reflecting not only the original physical injury but also on-going psychological distress. Chronic Pain Syndrome and Depression can co-exist and either may precede the other. Both have been shown independently to have an adverse effect on memory.

Weight loss due to malnutrition is commonly seen where detention and ill treatment have been endured. Weight loss and prolonged malnutrition were found to produce reduced memory function when studies of prisoners of war from WW2 and holocaust survivors were undertaken, the proposed mechanism being vitamin deficiency principally Vitamin B deficiency.¹⁴⁴ Many torture victims give histories of inadequate diet and weight loss in detention and are likely to be similarly affected.¹⁴⁵

Although major head injuries which have caused significant periods of unconsciousness and amnesia are likely to have been recognised and the implication for that individual's memory highlighted in a medical report many torture histories are more unclear with regard to head injury. The account may be confused and may consist of repeated relatively minor head injuries or only vague accounts of periods of unconsciousness which may be difficult to distinguish from vasovagal episodes or episodes of dissociation. In this way significant symptoms of post-concussion syndrome may be missed unless they are specifically asked about; where they are a history of persisting headache, dizziness, poor concentration, memory loss, fatigue, irritability, anxiety, noise sensitivity and insomnia may be revealed. Retrograde and post traumatic amnesia affecting ability to recount details surrounding the time of severe head injury is now generally recognised but the effect of more minor head injuries on memory is less commonly appreciated. The effects of post-concussion syndrome may persist for months or even years affecting memory and this syndrome is more likely to occur where there have been multiple traumas as often occurs in victims of torture.

¹⁴³ There is increasing recognition of the adverse effects of drugs commonly used to treat chronic pain such as Opioids and Gabapentin and a move to reduce prescription of these.

¹⁴⁴ Sutker P et al, 'Cognitive deficits and psychopathology among former prisoners of war and combat veterans of the Korean conflict' [1991] American Journal of Psychiatry, 148(1), 67-72

¹⁴⁵ Cohen J, 'Errors of Recall and Credibility: Can Omissions and Discrepancies in Successive Statements Reasonably be Said to Undermine Credibility of Testimony' [2001] 69 Medico-Legal Journal 25

Having considered the physical and psychological effects of trauma and torture in general on the appellant's ability to recall and recount circumstances of their torture we now turn to look at the particular type of torture which has the most devastating psychological effect of all - rape and other sexual torture.

Rape and sexual torture: implications for asylum appeals

Rape is a common method of torture and is a common experience of those asylum seekers who have been tortured. Sexual torture was found to have occurred in 61% of the sample of torture survivors in a study published in 1990.¹⁴⁶ It is estimated that a minimum of half, and possibly more than 70%, of those females seeking asylum in the UK are victims of rape.¹⁴⁷ Rape is not however solely a female issue. In the case of the former Yugoslavia it has been estimated that more than 4,000 Croatian men were sexually abused by Serb militants throughout the conflict.¹⁴⁸ Rape affects not only the direct victim but is also deeply damaging to family relationships and the wider community and victims may be rejected by their family or spouse or by the whole community. Children who are born as a result of rape may be stigmatised by communities and rejected even by their mothers. Victims of rape experience serious acute and chronic medical problem including, but not limited to, forced pregnancy, miscarriage, infertility, maternal mortality and chronic sexual dysfunction. When raped with objects fistula formation resulting in bowel or bladder incontinence and recurrent infections may ensue. In addition to this, the psychological effects are extensive and pervasive. In addition to Post Traumatic Stress Disorder rape may result in Depression and chronic psychosomatic problems such as headaches and gastrointestinal disorders and fear of intimacy or in self harm and suicide. Rape commonly causes lifelong difficulty establishing and maintaining a loving and intimate relationship.

Rape and other sexual torture are problematic in asylum appeals for two broad reasons; the severity of psychological disturbance which ensues which impedes the appellant's ability to engage with the asylum appeal process effectively; and because of the association of rape and non-disclosure or late disclosure of torture.

Recognition of the impact of culture on the behaviour of rape victims is essential where an evaluation of credibility is being based on an account of sexual torture and subsequent actions. In some cultures men and woman who have been raped are not seen as victims

¹⁴⁶ Lunde I, Ortmann J., 'Prevalence and sequelae of sexual torture' [1990] *The Lancet*; 336:289-291

¹⁴⁷ Amiss, Cristel and Neale, Anne 2006, 'Asylum from Rape', *Critical Half: Bi-Annual Journal of Women for Women* (Neale, 2006) International, Vol. 4, No.1, Summer 2006, p. 29-32.

¹⁴⁸ Use of Sexual Violence in Armed Conflict: Identifying gaps in Research to Inform More Effective Interventions, UN OCHA, Research Meeting – 26 June 2008

deserving of society's support and it may be inappropriate therefore to apply western expectations to the behaviour of rape victims from other cultures. For instance women raped in Eritrea or Sri Lanka are perceived as having cause for great personal shame and to have good reason for self-disgust and self-hatred. This clearly affects the rape victim's ability and willingness to disclose a history of rape or other sexual torture both to close family members and to authorities. Silence is often the only means by which rape victims can protect their family's honour and future standing in the community. In many cultures responsibility for protecting the family honour is vested in the women of the family. Silence may be the only way of protecting this and future family relationships. In some societies such as Libya disclosure of rape results in the victim being treated as an outcast and a woman's husband may be forced to reject her in order to protect the family's honour. All of these societal factors can lead an asylum seeker to be unable to disclose a history of rape. Although no longer living as part of that society in their country of origin a rape victim will not easily be able to dismiss the values and attitudes with which they have been raised. They may also have joined ethnic communities in the UK and remain bound to the same societal values. Where a family or couple seek asylum therefore one or more may have been raped during torture but not have disclosed this to their spouse or other family members. In some cases the presence of the claimant's husband during interview will have prevented disclosure of rape.¹⁴⁹ With this cultural backdrop rape may only be disclosed at a very late stage, perhaps only in desperation after initially having been refused asylum.

"Persecutory rape", as opposed to "random" rape occurs within a framework of systematic abuse of human rights.¹⁵⁰ Persecutory rape, such as has occurred in the case of many tortured asylum appellants is particularly damaging psychologically. This may in part be because of the state of fear that the victim is in prior to the rape through witnessing atrocities or because of other abuse in detention. This form of rape is seen in asylum seekers escaping from Sierra Leone, Uganda and the Democratic Republic of Congo where rape may occur in association with many other horrors. Prolonged periods of detention and repeated rape as occurs in these countries results in a sense of hopelessness in the part of the victim who feels powerless and despairing, dissociation then develops as a coping mechanism where the victim knows there is no hope of escape or redress and dissociation

¹⁴⁹ Herlihy, J. & Turner, S.W., 'Should discrepant accounts given by asylum seekers be taken as proof of deceit?' [2006] *Torture Journal* Volume 16 No. 2

¹⁵⁰ Dr Michael Peel, 'Rape as a method of torture', Medical Foundation for the Care of Victims of Torture (May 2004)

itself leads to more severe and intractable psychological problems.¹⁵¹ The direct psychological effects of rape in asylum seekers may be compounded by experience of fear of deportation, social isolation, language barriers and racism along with concern for the wellbeing of family members left behind in the country of origin. The most common psychiatric conditions diagnosed as a result of rape are PTSD and Depression. Of all violent crimes rape has the strongest association with subsequent development of PTSD.¹⁵²

The features of PTSD which affect an appellant's ability generally to give testimony were mentioned briefly in the section on psychiatric illness and impact on asylum appeals, however there are particular reasons why PTSD arising from rape affects an individual's ability to take part effectively in their appeal. Provocation of distress by reminders of rape such as recounting details of the rape or situational reminders of the rape such as men in uniform or being subject to questioning in official buildings may prevent the appellant from being composed enough to give a coherent account of her abuse. Avoidance behaviour may develop whereby the individual avoids all possible triggers to causing such distress and as a consequence may be unable to recount her ordeal in any detail. Where detail of the rape is recounted, flashbacks may be provoked and the victim is unable to give evidence as the ordeal is relived or the victim may be unwilling to recount details of the rape through having experienced distressing flashbacks previously and being unwilling to risk provoking further such flashbacks. Hypervigilance causes unpleasant and distracting watchfulness and could be precipitated by close proximity of men to the rape victim in court making it difficult for the appellant to focus on answering questions and affecting her ability to engage with the tribunal. In addition to these features trauma and PTSD, as has been shown earlier, have a profound impact on memory.

Enduring Personality Change is a well-recognised long term psychological sequelae of trauma which affects normal emotional regulation.¹⁵³ Disturbed emotional responses demonstrated in the tribunal room may lead to an adverse evaluation of the appellant by the tribunal if they are not alerted to the possibility of this psychological condition which causes an apparently abnormal lack of emotional response in the individual during discussion of traumatic events. Depression, which often follows rape, also affects an

¹⁵¹ "Dissociation: the separation of unpleasant emotions and memories from consciousness with subsequent disruption to the normal integrated function of consciousness" in David Semple, Roger Smith, *Handbook of Psychiatry* (2nd edn, OUP 2009) p739

¹⁵² Steketee G, Foa E. "Rape Victims: Post-traumatic stress responses and their treatment: a review of the literature", [1987] *J Anxiety Disorders*; 1:69-86

¹⁵³ The ICD-10 Classification of Mental and Behavioural Disorders: Clinical descriptions and diagnostic guidelines (World Health Organisation 2004) p 209, F62.0

individual's ability to give evidence through impaired concentration and low mood, hopelessness, pessimism and apathy in addition to impaired memory.

The risks of making decisions based on adverse credibility findings based on misunderstanding of the nature of traumatic memories or lack of understanding of the effects of psychiatric and physical illness are clear. Commonly held beliefs such as consistent testimony being an indicator of "truth" have been shown to have no basis particularly where traumatic memories are concerned. Indeed the concept of "truthful" testimony has been shown to be a rather naïve construct when the limitations and nature of human memory are considered. Memories as we have seen are dynamic rather than fixed and are affected not only by past experience but by current psychological state. The overwhelming difference between human memory and recording media such as video has been illustrated. The purpose of reviewing the scientific and medical understanding of traumatic memory and psychiatric conditions is to illustrate the complex interactions which impede the asylum seeker who has been the victim of torture in the effective presentation of their case. In the final chapter the steps that the tribunal can take to provide such appellants with a safe appeals process is discussed.

Judges have been advised to take account of information such as is contained in this chapter before.¹⁵⁴ Concern over judge's lack of regard for the impact of trauma on appellant's testimony has existed for some time.¹⁵⁵ It is disappointing therefore to see cases such as those quoted in the recent report Body of Evidence.¹⁵⁶ In an attempt to understand why Immigration Judges are so resistant to using medical evidence effectively in these appeals the approach of the asylum appeal tribunal to medical evidence and

¹⁵⁴ Joint Presidential Guidance Note No 2 of 2010; Child, vulnerable adult and sensitive appellant guidance ,<<http://www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/lower/ChildWitnessGuidance.pdf>> accessed 23 September 2012

¹⁵⁵ Rhys Jones, D. & Smith, S, 'Medical Evidence in Asylum and Human Rights Appeals'[2004] International Journal of Refugee Law, Vol. 16, No 3, pp.381-410

¹⁵⁶ Body of Evidence (n40) p85

Case 37: In an appellant where the MLR confirmed evidence of all the torture methods claimed. "If this appellant had genuinely been tortured over a period of three years it is highly probable his accounts of the methods of torture by him would be consistent"

Case 25: The Immigration Judge does not accept the appellant's account as credible in key areas of his testimony, especially because of inconsistencies with regard to his account of his actions. The appeal is disallowed on grounds of lack of credibility despite the Immigration Judge accepting the MLR as carrying weight "I am satisfied that the appellant has suffered torture in the past in x...I am also satisfied having regard to Dr X's opinion that the appellant is suffering from PTSD, depression and memory loss".

Case 21: In failing to take account of the effects of trauma on memory and recall discussed within the MLR the judge commenting on lack of consistency "This is an appellant who claims to have been educated at University: I therefore find it incredible that she is unable to maintain even a basic consistency in her account."

expertise will now be analysed and contrasted with that of judges in other UK tribunal jurisdictions.

Regard to medical evidence and the place of medical expertise: a significant structural problem

There are three components to this analysis of comparative practice. Firstly the tribunal's requirement for medical evidence, secondly the tribunal's regard to medical evidence, thirdly, and lastly, the place of medical expertise within the asylum determination process. The significantly different approach to both medical evidence and medical expertise in other UK jurisdictions will then be considered and the argument made that the approach of the FTT of the Immigration and Asylum Chamber is not adequate.

Firstly, the tribunal's requirement for medical evidence. In the decision centred on the overriding requirement of procedural fairness in relation to hearing and assessing evidence, Lord Mustill is quoted as saying "what fairness demands is dependent on the context of the decision" as he observed that what fairness requires is essentially an intuitive judgement.¹⁵⁷ This decision notes that under Rule 43(1) of the Rules¹⁵⁸ the Tribunal has the power to decide the procedure to be followed in relation to any appeal or application, in doing so however it must act fairly. The context of an asylum appeal decision is that it may determine whether or not an individual is returned to risk of further persecution. It is argued here therefore that what fairness demands in these appeals is that the tribunal take all reasonable steps available to it to ensure that evidence which may substantiate a history of torture or aid the tribunal's proper evaluation of the appellant's oral evidence is available to it before a decision is made. In asylum appeals where a successful appeal is highly dependent upon the appellant being believed, corroborating evidence or evidence which might give an explanation for inconsistencies between accounts given over time can be crucial. The consequences of an appellant being incorrectly disbelieved are potentially catastrophic. Almost uniformly the only corroborating evidence that such an appellant can produce is medical evidence. Where such medical evidence is not available and an account of torture is given it is argued here that the immigration judge's intuition should lead him to find that such evidence should be made available before a decision is made. Having regard to the Chamber's own guidance on vulnerable witnesses, where an appellant gives a history of torture and no medical evidence is available, a judge who has decided to proceed and reach a decision on the appeal should be able to give reasons why such evidence is not

¹⁵⁷ *H.A. & T.D. v. Secretary of State for the Home Department* [2010] CSIH 28

¹⁵⁸ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230

required to ensure a fair hearing in that case. The judge should be able to explain how he has been able to take account of the possible psychological effects of torture on the appellant's testimony without benefit of a medical report commenting on the individual's psychological state. Given the concerns raised by research into the basis of credibility findings in asylum appeals the tribunal judge should also give reasons for concluding that he is able to safely make a fair decision based on credibility findings in the absence of corroborating evidence of torture that could have been made available. It is difficult to imagine a judge being in a position to do so without particular expertise in the field of medicine or psychology. If immigration judges followed their own Chambers guidance and were thereby forced to air their reasoning on these issues it is likely that change in behaviour would occur as judges would find that they required medical evidence in these appeals.

Rule 43(1) gives the Tribunal the power to adjourn to enable such a medical report to be produced. Past torture is recognised as a strong indicator of future risk of persecution.¹⁵⁹ It is important therefore that where the appellant gives a history of torture the appellant has the best possible opportunity to demonstrate a history of past torture. Research shows that this requires expert medical evidence to be available.¹⁶⁰

On considering the cost of such an adjournment or direction Jacobs should be noted where he says "Any aspect of procedure that limits the amount of money that a party may devote or expect others to devote to a case reduces the chances that the part will secure substantive justice."¹⁶¹ When a line is being drawn in the sand as to the limits beyond which the public purse will not stretch to provide judicial review of government decisions, the nature of the substantive justice being sought must be borne in mind. In the case of an appeal against refusal of asylum, adjournment and the commissioning of a medical report may not then be seen as disproportionate to the importance of the appeal.

In significant contrast in Social Security and War Pension appeals entitlement to benefit and compensation are under appeal rather than a claim for asylum. The regulations under

¹⁵⁹ *Demirkaya v Secretary of State for Home Department* [1999] All ER (D) 659

¹⁶⁰ Asylum grant rates following medical evaluations of maltreatment among political asylum applicants in the United States J Immigrant Minority Health (2008) 10: 7-15 this study considered the utility of medical evaluations in asylum adjudication and concluded that medical evaluations may be critical in the adjudication of asylum cases when maltreatment has been alleged. This large study showed a grant rate of 89% amongst asylum seekers who had had a medical evaluation as opposed to a grant rate of 37.5% amongst those who had no medical evaluation. This is consistent with UK research undertaken by Freedom from Torture reported in Body of Evidence which shows a higher grant rate where medical evidence is available.

¹⁶¹ Edward Jacobs, *Tribunal Practice and Procedure* (2nd edn, Legal Action Group 2011) 3.27

which the tribunals instruct medical evidence are detailed;¹⁶² in Social Security tribunals if a medical or other technical question arises the tribunal may request a medical or other technical specialist to provide a report in relation to the question and if the question is a medical one, arrange for the appellant to be examined for the purposes of the preparation of such a report. In the WPAFCC procedure rules enables a tribunal to both arrange and pay for an expert's report to answer a medical or technical question which arises in an appeal. This power provided by the rules of procedure is an important tool by which the tribunal can attempt to reduce the inequality of arms between the appellant and the state. Where the tribunal is minded to consider adjourning for such medical evidence it is encouraged to be clear what evidence it is that they require in the light of the issues in the appeal and the evidence already available, they are discouraged from adjourning unnecessarily and asked to consider whether the lack of evidence can be compensated for in some way such as by the use of the tribunal's own expert knowledge and whether it is proportionate to the importance of the appeal to adjourn. Despite this encouragement to proceed where possible in a recent 12 month period the FTT of the Social Entitlement Chamber spent £285,000 commissioning medical reports.¹⁶³ It can only be assumed that tribunals felt that this was necessary to give effect to the overriding objective of the Chamber rules, namely dealing with a case fairly and justly including dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties. If tribunals adjudicating on levels of Social Security benefit find that it is just and proportionate to adjourn and instruct medical evidence it is argued that it would be difficult to justify taking the position that it is not just and proportionate to adjourn and instruct medical evidence in asylum appeals involving torture.

Secondly, having considered the tribunal's responsibility with regard to the availability of medical evidence, the second part of this section considers the tribunal's approach to such

¹⁶² The authority to refer a person for medical examination in appeals under section 12 of the Social Security Act 1998 lies in Rule 25 of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008. At r.25 (3) if an issue which falls within Schedule 2 of the rules is raised in an appeal the Tribunal may exercise its power under section 20 of the Social Security Act 1998 to refer a person to a health care professional approved by the Secretary of State for the examination of that person and the production of a report on that person. The authority to adjourn for a GP or treating specialist report in social security arises from the broad provisions of rule 5 – case management powers r 5 (1), 5 (2) and more specifically 5 (3)(d). In the WPAFCC authority to obtain a medical report is contained within Rule 24 of the procedure rules- Medical examinations and commissioning of medical evidence etc. Rule 24(1) contains a provision regarding medical examination undertaken by a member of the tribunal and this and the similar provision for medical examination during the tribunal allowed for by Rule 25 of the Social Security rules is discussed further in the following section on medical members of the tribunal.

¹⁶³ Information supplied to author by Robert Martin, President, Social Entitlement Chamber, Tribunal, HMCTS on 30th June 2011

medical evidence where it is available. Where medical reports, which conform to the requirements of the jurisdiction, are available it is important that they are treated as the expert medical opinion that they are. They should be approached as recommended in the IARLJ guidance.¹⁶⁴ In these guidelines it is noted that in some jurisdictions there may be no procedural provisions in place for expert medical evidence. In the case of the FTT of the Immigration and Asylum Chamber, the Practice Directions make reference to expert evidence but deal solely with the duties of the expert to the tribunal. Nothing is said about the correct approach of the tribunal to the expert evidence.¹⁶⁵ This lack of specific guidance may be responsible for the problematic approach taken by some judges in this jurisdiction to medical evidence as revealed in the research reviewed in chapter one. Firstly the view that the report is based upon the appellant's statements which have been accepted unquestioningly by the doctor and which therefore in the opinion of judges who take this approach undermines the value of the doctor's conclusions. Secondly that the weight that judges are willing to put on the report dependent on their evaluation of the author's standing. Lastly the inappropriate approach of some judges whereby the evidence is not viewed "in the round" and a view on credibility is formed and the medical evidence is then considered to determine whether in itself it is sufficient to overturn the adverse findings on credibility. The IARLJ guidelines if adopted address most of these failings. They note that attention should be given to each and every aspect of medical reports and emphasise the need for any decision maker to enter in to a meaningful discussion of how the applicant's serious medical condition disclosed in the medical evidence has been taken account of before making a negative credibility finding.¹⁶⁶ They note that expert medical evidence should be treated as an integral element of all the evidence considered in establishing the facts and go on to say that if medical evidence is dismissed by the decision maker as of little value this must be accompanied by appropriate reasoning and that the lay decision maker should not substitute his or her own opinion for that of a reliable expert.¹⁶⁷ The guidelines acknowledge that the consideration given to a report will depend upon the quality of the report and the standing and qualifications of the author and go on to say that whilst medical evidence may not provide conclusive evidence that torture has occurred it will provide expert opinion on the degree to which the injuries or behaviour presented

¹⁶⁴ IARLJ Guidelines on expert medical evidence (n121)

¹⁶⁵ Tribunals Judiciary, Practice Directions made by the Senior President of Tribunals, Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal
http://www.judiciary.gov.uk/Resources/JCO/Documents/Practice%20Directions/Tribunals/IAC_UT_FtT_PracticeDirection.pdf accessed 23 September 2012

¹⁶⁶ IARLJ Guidelines on expert medical evidence (n121) para.1.2.5

¹⁶⁷ IARLJ Guidelines on expert medical evidence (n121) para.6.1

correlate with the allegations of torture.¹⁶⁸ These authoritative international guidelines have therefore identified the same three areas of concern with regard to the correct approach to medical evidence in asylum appeals as the NGO whose research was reviewed in chapter one. A recent Court of Appeal judgement in which the key issue was whether expert evidence relied upon by an asylum seeker amounted to “independent evidence” of torture goes to the heart of the matter on all three of these points. In this judgement Rix LJ in giving the unanimous judgement of the Court of Appeal strongly disagreed with the High Court Judge and held that the report did amount to independent evidence of torture.¹⁶⁹ The detailed analysis by Rix LJ of the basis of expert medical evidence in cases of torture is very helpful as it highlights the intellectual process which writers of such report bring to bear. Namely the triangulation of; physical and psychological symptoms and signs found on examination; observed behaviour of the client whilst giving their account; account of ill treatment; and medical knowledge of the injuries and illnesses sustained. Together this

¹⁶⁸ IARLJ Guidelines on expert medical evidence (n121) para.3.2

¹⁶⁹ *R (on the application of AM)* (n127). The case concerned a claim against the Home Office for wrongful imprisonment contrary to the UKBA's Enforcement Instructions and Guidance which says that where there is “independent evidence” of torture, detention is only suitable in “very exceptional circumstances”. The case is of an Angolan woman detained by the UKBA following her unsuccessful appeal to the Asylum and Immigration Tribunal against refusal of her asylum claim. The tribunal had found her to have “no credibility whatsoever”. Whilst detained a fresh claim was granted on the basis of new evidence, in the form of medical reports but refused. The tribunal sitting on the asylum appeal arising out of this second refusal in granting her appeal found that she had been raped and tortured as claimed and that torture was the cause of scarring on her body. The case against the Home Office arose from refusal to release her from detention in accordance with the UKBA's Enforcement Instructions and Guidance during the period prior to her successful appeal. The Home Office had based this refusal on their view that the medical reports did not amount to “independent evidence” of torture. Mr Justice Burnett in the High Court subsequently agreed with the Home Office that the reports did not constitute independent evidence and concluded also that exceptional circumstances existed. Having disagreed strongly with this view and reached the opposite conclusion with regard to the nature of independent evidence Rix LJ was critical of the basis upon which the judge had additionally reached the view that there were exceptional circumstances in favour of maintaining detention. Having commented that the judge had not detailed the “ample material” taken into account, Rix LJ refers critically to factors which do appear to have been considered such as the Secretary of State's (SoS) assertions that the new representations are a “try on”, the Asylum and Immigration Tribunal's view that the appellant is “totally lacking in credibility”, and the view expressed by the judge considering the previous judicial review claim that the claim was totally without merit and hopeless. In reaching his own conclusion that exceptional circumstances did not exist Rix LJ draws attention to the lack of appreciation that throughout the period during which these adverse conclusions were being reached the woman had been largely unrepresented, had made no witness statement and had not been referred to a centre with specialist medical expertise. He goes on to make it clear that the SoS was wrong not to consider the medical reports on their own merits and to label them merely as a “try on” and wrong not to consider the representations and reports as a significant change from the previous position. On the central issue of medical experts taking what clients say at face value Rix LJ distinguished the process by which the independent expert had expressed her own views based on her findings from that of a mere recital of the assertions of the subject of the report. He argues that if the mere fact that the starting point of such a report is the account of the client means that the report is refused the status of independent evidence then practically all meaning would be taken from the policy that independent evidence of torture makes the victim unsuitable for detention. He notes that requirement of “evidence” should not be taken as meaning requirement of “proof”.

allows the medical expert to say to what extent their examination findings as a whole correlate with the client's account of torture and that is what is expressed in the report. For this reason Rix LJ is correct in asserting that such a medical expert's belief in itself amounts to independent evidence of torture. This judgement clearly states that those immigration judges who adopt the stance that medical evidence does not provide independent evidence of torture because that medical evidence is dependent upon accepting the claimant's account as to causation are mistaken. This is important in asylum appeals as this is the reasoning used by some judges to put little or no weight on medical reports and to justify findings on credibility which would otherwise be clearly perverse.

Continuing on the discussion of the tribunal's approach to medical evidence this judgement also makes important statements about who should provide expert evidence and how expertise should be judged. The point is made that expertise should be judged by relevant experience and not titles. Much weight is given to the adoption of the terms of the Istanbul Protocol within the report to describe and evaluate the signs of torture and attention to this in proximity to discussing the authors experience suggests that familiarity with this system of reporting is considered by him also as evidence of appropriate expertise in the field to which due weight should be given.

A further area of concern with regard to the tribunals approach to medical evidence is the inappropriate separation by some judges of medical evidence from the rest of the evidence. Case law has established that all evidence should be viewed in the round and that there should not be a two-step approach to establishing first whether torture has occurred.¹⁷⁰ However research reviewed in chapter one reveals that some judges are still separating medical evidence from other evidence and asking themselves what weight to attach to the medical evidence in light of adverse credibility findings.¹⁷¹ The decision currently being analysed does not deal with this issue directly as the decision under appeal only had to deal with whether "independent evidence" of torture had been produced, but Rix LJ demonstrates significant understanding of the uneven struggle faced by appellants in saying "It is of course true that her (Ms Krajl, the medical expert) assessment was conducted without the benefit of knowledge of AM's litigation history. But then that litigation was conducted without benefit of Ms Krajl's reports."¹⁷² This judgment goes to the heart of the three components initially identified for examination at the start of this section on medical evidence and medical expertise; the tribunal's requirement for medical

¹⁷⁰ *Karanakaran v SSHD* [2000] EWCA Civ 11, Imm AR 271

¹⁷¹ *Body of Evidence* (n40), p 6, para 9

¹⁷² *R (on the application of AM) v Secretary of State for the Home Department* [2012] EWCA Civ 521 [17]

evidence; the tribunal's regard to medical evidence; and the place of medical expertise within the asylum determination process. The second of those components, regard to medical evidence, is currently under discussion and three specific grounds for concern have been raised above; the immigration judge's view on the credulity of doctors and the weight therefore given to expert evidence; challenge to the expertise of medical experts and therefore the authority of reports; and inappropriate separation of medical evidence from the evidence as a whole. Having analysed regard to medical evidence in some depth, the more difficult to elucidate phenomenon of a generally hostile approach to medical evidence and experts in asylum appeals is now considered in an attempt to address the third and last aspect of asylum appeal practice to be critically analysed in this section: the place of medical expertise.

Medical expertise in this context comprises both the medical report and the medical expert themselves. Concern regarding hostility towards medical reports in asylum appeals has been the subject of a number of articles¹⁷³ and reports.¹⁷⁴ It is possible that this is in part due to the immigration judge being uncomfortable with the large professional opinion component of medical evidence in this jurisdiction. Judges not appreciating that this is inevitable given the subject matter in the jurisdiction and sitting in other jurisdictions may compare medical reports in asylum cases unfavourably with medical reports they see elsewhere which have a larger component of apparently objective medical examination findings. It is in the nature of torture that few objective signs exist and those that do exist rarely have no other possible cause. The torturer is adept at hiding his work and the human body has truly remarkable powers of healing. This limited amount of apparently objective evidence of torture in medical reports may result in an unwarrantedly cynical approach to medical evidence in asylum appeals. Greater understanding of forensic medicine and of the methodology employed by medical examiners when writing these reports might assist in the evaluation of these reports.

Looking at the human aspects of this question another possible explanation for the apparent hostility towards medical reports in asylum tribunals is raised by the social anthropologist Professor Anthony Good.¹⁷⁵ Good considers what he refers to as the "hegemonic struggle" between the judiciary and professional experts. As a country of origin expert himself he is particularly concerned with the relationship between country of origin experts and asylum judges and, having initially expected to be able to point towards

¹⁷³ Rhys Jones, D. & Smith, S (n155)

¹⁷⁴ Body of Evidence (n40)

¹⁷⁵ Anthony Good, *Anthropology and Medical Expertise in the Asylum Courts* (Routledge-Cavendish 2006)

a happy relationship between medical experts and asylum judges as a comparator in his research, expresses his surprise at finding tensions also existing between medical experts and the judiciary. Good refers to the work of Jarvis on assessment of credibility by immigration judges¹⁷⁶ where she considers whether both professions have a tendency to consider their views should take precedence over the other because each profession has its own unique but similar “apprenticeship” system which has been validated within each profession over many generations and as a part of which the professions have developed their own language and decision making processes. Therefore she suggests that it is possible that this leads each profession to think that those out with that profession simply cannot appreciate the innate superiority of the logic employed within.¹⁷⁷ This professional rivalry could account for some of the hostility towards medical evidence and it is possible to hypothesise that having a member of the tribunal whose area of expertise is medicine allows the tribunal to be comfortable and confident in its ability to fully evaluate any medical evidence thereby engendering a less hostile and perhaps defensive reaction to such medical evidence. Medical evidence is often the only corroborating evidence in asylum appeals, therefore factors which adversely affect the tribunals approach to that evidence may be critical to the outcome of an appeal: the attitude of immigration judges towards the medical experts who have written such reports is therefore of significance.

Good considers the history of expert witnesses, tracing their origins from specialist members of juries to the current day position of experts called upon to give evidence to the court on specialised types of facts. He speculates whether this history in part accounts for the great fear that courts appear to have of the expert witness pronouncing on the “ultimate issue”.¹⁷⁸ The importance of regard to the “ultimate issue” in asylum appeals is illustrated in decisions made where the whole medical report has been regarded as carrying little or no weight as the immigration judge views that the doctor producing the report has strayed into passing comment on credibility. In producing a medical report for an asylum claim the doctor is called upon to comment upon the probability of the evidence given the hypothesis but not the probability of the hypothesis given the evidence, as to confuse the two may significantly distort the value of the evidence as in the so called “prosecutor’s fallacy”.¹⁷⁹ Many doctors will struggle to distinguish these two processes and appellant’s risk having the report disregarded if the doctor writing the report inadvertently breaks this unwritten

¹⁷⁶ analysed in Chapter One of this thesis

¹⁷⁷ Catriona Jarvis (n39)

¹⁷⁸ Anthony Good (n175) Chapter 6: Good notes that although the “ultimate issue” rule was abolished in civil cases by the Civil Evidence Act 1968 it continues to hold great sway with regard to the acceptability or otherwise of expert reports in asylum cases

¹⁷⁹ Anthony Good (n175) page 135

rule. A significantly different approach to medical evidence can be seen in Social Security and War Pension appeals. In the case of the latter two jurisdictions a medical report which in addition to commenting on diagnosis and disability arising from a medical condition goes on to express an opinion on the merits of the appeal will be considered in full and due regard paid to those aspects of the report concerned with diagnosis and disability arising. Where the doctor goes on to give a professional opinion as to whether the legislative tests are met this will also be considered along with the basis upon which the doctor bases that view and the relevant experience of the doctor.¹⁸⁰

With regard to tribunal deference to expert medical reports it has been suggested that the lack of experts engaged by each party or a jointly commissioned report may be a factor and the possibility of a single court appointed expert has been raised.¹⁸¹ In other jurisdictions such as Social Security and War Pensions both sides will generally provide medical evidence and the tribunal itself not uncommonly instructs medical evidence. It is of note that there is little concern raised in these jurisdictions of a general lack of deference to medical evidence. Whatever the cause of the problematic approach to medical expertise in asylum appeals, a hegemonic struggle between the professions, a lack of respect for another professions' reasoning and decision making processes, or the unequal provision of expert evidence, none of it is under the control of the appellant and it occurs at great risk to the proper evaluation of evidence.

In asylum appeals immigration judges sit alone. The situation in social security and war pension tribunals is that medical practitioners sit as medical members alongside legally qualified tribunal judges with the addition in war pension tribunals of a third member who is a member with experience of the Armed Forces and in the case of some social security tribunals a third member who has experience of disability.¹⁸² These medical, service and disability qualified tribunal members are judicial office holders appointed through the judicial selection process and trained to take a full part in the tribunals' proceedings

¹⁸⁰ From the author's personal experience of over 20 years of sitting on Social Security tribunals, comments of this nature by the doctor do not cause these tribunals to conclude that the entire report is invalidated

¹⁸¹ Rhys Jones (n155)

¹⁸² In Social Security tribunals of the Social Entitlement Chamber it is a Practice Statement issued by the Senior President which makes provision for the composition of the tribunal. In the War Pension Armed Forces Compensation Chamber the composition of tribunals is not prescribed in the tribunal rules. The composition of WPAFC tribunals is provided for in the Chamber President's Practice Statement No. 1 Authorisations and Delegations which states; 1. The Senior President's Practice Statement of 30 October 2008, made under Article 8 of the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008, provides that a decision "that disposes of proceedings or determines a preliminary issue (except a decision under Part 4 of the 2008 Rules)" must be made by one judge, one service member and one medical member (or two medical members in addition to the judge and service member if the Chamber President considers it appropriate in any case or class of case).

including decision making, as such they form an essential part of the “specialist” tribunals envisaged by Leggatt and discussed briefly below. Medical members, being subject matter experts, in addition to contributing to the proper evaluation of medical evidence are able to promote a more active inquisitorial approach where medical matters or disability arise through asking relevant questions. Where appellants are unrepresented or vulnerable this active fact finding and enabling approach by expert members of the tribunal is even more important. Medical members are often the most appropriate members of the tribunal to explore such sensitive issues as sexual abuse. Medical members can therefore be instrumental in delivering a truly inquisitorial and enabling appeal process. It is argued here that all asylum seekers who have been tortured are vulnerable appellants who would benefit from having medical expertise available.

In Social Security appeals Medical Practitioners were initially used as Medical Assessors and were not part of the decision making process.¹⁸³ This was not found to be an effective use of medical expertise and this system is no longer used, medical members now sit as part of the tribunal.¹⁸⁴ In tribunals with medical members sitting it will often fall to the medical member to explore the medical evidence with appellants, improbable or contradictory statements within the medical evidence can be analysed by a medical practitioner on the tribunal and explored with the appellant and it may be that this gives the tribunal more confidence in its ability to evaluate the medical evidence thereby engendering a less suspicious attitude to medical evidence in those tribunals which have medical members.

An important additional role of medical members in some tribunals is to undertake examination of the appellant. This has developed along different lines in different jurisdictions. Social Security r25(1) provides for an appropriate member of the tribunal, a registered medical practitioner, to carry out a physical examination of a person where the case relates to the extent of that persons disablement and its assessment or diseases or injuries prescribed.¹⁸⁵ In effect this restricts medical examination of the appellant to industrial injury benefit, severe disablement allowance and compensation recovery tribunals. In this situation the medical member themselves produces new evidence on the day in the form of a brief report of clinical findings to be considered by parties and the tribunal. In the WPAFCC r24(1) provides that an appropriate member of the Tribunal may

¹⁸³ Social Security (Incapacity for Work)(General) Regulations 1995 Regulation 21 provided for a Social Security appeal tribunal to sit with a medical assessor.

¹⁸⁴ The Social Security (Decision Making and Appeals) Regulations 1998 provided for the presence of the medical member on the tribunal.

¹⁸⁵ The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008

make a medical examination of the appellant if—(a) the proceedings relate to the appellant’s disablement or incapacity for work; and (b) the appellant consents.¹⁸⁶

The Senior President of Tribunals must have regard to the need for members of tribunals to have particular expertise, skills or knowledge.¹⁸⁷ The importance of relevant specialist knowledge amongst members of tribunals as a defining characteristic of tribunals was highlighted by Leggatt.¹⁸⁸ Pertinently he makes it clear that this applies particularly to the Immigration and Asylum Chamber saying “Many cases would not be suitable for hearing by a chairman, even legally qualified, sitting alone and expert members should be used when appropriate at this level.”¹⁸⁹ Although medical knowledge is not specifically identified as a relevant skill or experience which may be required by the tribunal in this passage it is in no way excluded. This chapter has demonstrated the importance of medical evidence in asylum appeals where the appellant has been tortured and it is argued that the correct interpretation of such medical evidence by the tribunal would be assisted by the presence of a medical member on the asylum tribunal or through access to a Medical Assessor.

In summary all of this lengthy discussion has demonstrated the importance of understanding the medicine which lies behind appeals involving victims of torture and, crucially, of using medical evidence effectively in these appeals. The final chapter in this thesis demonstrates how this information sits with the argument put forward in chapter two that an adversarial system is required to provide access to justice for these appellants.

¹⁸⁶ Tribunal Procedure (War Pensions and Armed Forces Compensation Chamber) Rules 2008

¹⁸⁷ First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008, at 2 (2) (b)

¹⁸⁸ Leggatt (n20)

¹⁸⁹ Leggatt (n20) Part 11: Individual tribunals: The Immigration Appellate Authorities; We therefore wish to see the general model applied to immigration and asylum work in the Tribunals System. There should be a first-tier immigration and asylum tribunal, within a separate Division, which should be the sole judge of issues of fact. Complex factual issues are a regular feature of immigration and asylum cases, ranging from the circumstances of an alleged marriage or the obligations within an extended family abroad to the political situation in a country from which asylum is sought. Many cases would not be suitable for hearing by a chairman, even legally qualified, sitting alone and expert members should be used when appropriate at this level. In setting the qualifications for appointment to the tribunal, and to sit in particular cases, we believe that special care should be taken to ensure that those selected bring relevant experience and skills to the decisions to be taken, such as knowledge of conditions in particular countries concerned, or of refugees.

Chapter Four: The case for change

By examining the issue both from the standpoint of medical awareness and international and domestic public law this thesis has shown why individuals who have been tortured currently struggle to access protection in our asylum appeal tribunals. Asylum appeal tribunals appear to continue to operate immune from the progress being made in other jurisdictions toward enabling and inquisitorial practice. The advent of the unified tribunal service acts as a challenge to the status quo as does the clear thrust of international law and expectations arising particularly from the Strasbourg Court.

These appeals are of potentially life and death importance to individuals and warrant a correspondingly high degree of procedural protection. It is the procedure and processes of the asylum appeal tribunal which has largely been the subject of this thesis. This thesis has shown that asylum appeal tribunals currently lack the membership, tools and ethos to protect torture survivors from adverse decisions of the Home Office which expose them to the risk of further persecution. Adversarial practice seriously disadvantages appellants who have difficulty presenting their case and may be poorly represented. Lack of understanding of the psychological consequences of torture, particularly sexual torture, and unacceptable disregard to expert medical evidence inevitably has led to unsafe decisions. Assessment of credibility itself lacks method leading to inaccurate decision making. Asylum tribunals do not demonstrate an understanding of diversity nor of the need to keep an open mind and to judge each case fairly, independently and impartially. Together this amounts to neglect of the principles of 'natural justice' and leads to unfair hearings and an appeal system which is not providing access to justice for torture survivors. Lack of UKBA action where appeals are unsuccessful is sometimes cited as a source of reassurance by tribunals which acknowledge that they reach decisions on arguable findings. This is of little solace to those individuals who are deported and even where refoulment does not immediately follow an unsafe decision there is no room for complacency. Destitution, defined as no access to benefits no right to work and no accommodation, is common amongst refused asylum seekers in the UK,¹⁹⁰ and further psychological harm is caused when a history of torture is denied.

¹⁹⁰ *Refused: the experience of women denied asylum in the UK* [2012] Women for Refugee Women, 52 Featherstone Street, London

There are seven specific and obvious recommendations which would address the concerns identified to date. Firstly and crucially it is clear that Leggatt's wishful thinking has not come to pass within asylum appeal tribunals. This failure on the part of the tribunal to respond to Leggatt's challenge may now be contrary to European and International law. It is crucial that the tribunal adopt the enabling and inquisitorial practice outlined by Leggatt and espoused by other tribunals such as Social Security and War Pensions. In asylum appeals appellants are particularly reliant upon the tribunal to act proactively to ascertain all the facts. The psychological effects of torture, discussed in detail in chapter three, are pervasive and devastating: they impact on the appellant's ability to disclose history of torture, to recall details of events and to give consistent and comprehensive testimony. The appellant's ability to communicate effectively with the tribunal is impaired not only by the effects of trauma but by cultural and language barriers, which are not always overcome through interpreter services. Legal representation in these jurisdictions is recognised to often be weak, where it is available. For all of these reasons tribunals in this jurisdiction, above all, require to act in a fully enabling and inquisitorial fashion to ascertain all the facts and thereby provide fair hearings to these appellants.

Secondly in this jurisdiction there is need for a specific expression of the inquisitorial function in the tribunal's positive obligation to seek evidence of potential past ill-treatment where it has been alleged. This means that the tribunal must ensure that medical evidence is available in all appeals where a history of torture is given. Where this has not been instructed by the appellant or the state, the tribunal should instruct that it be produced.

As has been shown in chapter three, medical evidence may corroborate accounts of past torture which might not otherwise be accepted, may provide explanation for late disclosure and will inform the tribunal as to any effects of traumatic experiences and physical or psychological conditions on the appellant's ability to give testimony. It is therefore necessary to have such evidence available and to consider it in the round along with all other evidence when assessing credibility. As we have seen assessment of credibility is nearly always determinative in these appeals.

Flowing from this is the third requirement, namely that the tribunal must evaluate such medical evidence properly. The possible reasons for the tribunal's hostile approach to medical evidence have been discussed. What is clear is that medical evidence should be given due weight and where the professional opinions contained within it are not accepted the tribunal should say upon what basis they are not accepted. Relevant training and experience in the field along with adherence to the methodology and terminology of the

Istanbul Protocol should mean that significant weight is given to medical evidence whatever the medical specialism of the author. The tribunal in its decision should show how it has taken account of the information contained within the medical evidence particularly where it has either disbelieved the account of torture or where it has drawn adverse credibility findings on account of inconsistencies in the appellant's testimony.

Fourthly to enable it to properly evaluate medical evidence and explore medical issues where there has been a history of torture tribunals should have access to medical experts as do other tribunals. The specialist nature of tribunals is heavily promoted by Leggatt as a defining feature of tribunals: it is difficult to see how immigration judges sitting alone meet that description. Other tribunals have medical members sitting as members of the tribunal, providing medical reports and undertaking medical examinations as part of the hearing process. In appropriately selected asylum appeals there should be a medical practitioner sitting as a member of the tribunal or acting as a medical assessor to significantly increase the expertise of the tribunal.

The fifth identified need is for there to be binding guidance in this jurisdiction as a means to influence and change the prevailing ethos. The Vulnerable Witness Guidance needs strengthened, with much increased emphasis on torture as the most common cause of vulnerability amongst these appellants. There should be increased guidance on the psychological effects of torture and on the appellant's ability to engage with the tribunal. The tribunal's guidance on expert evidence should be amended to include the correct approach of the tribunal to expert medical evidence as detailed in the IARLJ's guidance. Most importantly the Tribunal Procedure Committee should be responsible for producing the rules of the Immigration and Asylum Chamber, as it is for other Chambers, as a means to change the prevailing culture within immigration and asylum. The Chamber should bring its rules into line with those in other Chambers.

It is of course not sufficient simply to introduce new guidance. The sixth identified need is for the tribunal to embark upon structured training to address identified weaknesses and to promote understanding of and application of any new guidance. Joint training with other jurisdictions should be encouraged to promote spread of good practice and exchange of ideas and outside expert bodies, such as those providing medical reports, should be invited to contribute to training.

Criticism of practice as contained within this thesis does not apply equally to all immigration judges. Examples of good practice are acknowledged however it cannot be right that, as was said by one respondent in the research studied for this thesis, the outcome

of an asylum appeal is a lottery: it all depends upon which judge you come before. Accuracy of decision making is crucial and the seventh identified need is therefore for a robust appraisal process to be implemented which identifies poorly performing judges. Identification of such poor performance should result in a period of remedial training followed by re-assessment: only where remedial training has proved effective should the judge continue to sit. Acknowledging and addressing poor performance amongst judges should not be avoided by confusing it with interference with judicial independence.

Further opportunity for improvement is presented by the development of the new Tribunal System for Scotland. Great emphasis is made in discussion documents on the optimum use of judicial resources within the new system with a more flexible approach to members sitting across jurisdictions. This would be an effective means of challenging the “silo” approach of individual tribunals and an opportunity to spread good practice as well as reducing barriers to medical members sitting on asylum appeals where appropriate. The Scottish Government also has the stated aim of operating one set of rules applicable to all jurisdictions. It is an opportunity to require all tribunals to operate in an enabling and inquisitorial manner and if, as anticipated, the system ultimately extends to reserved tribunals such as asylum and immigration this will be a direct challenge to existing practice both in Scotland and, as a result, throughout the UK. In this way Scotland can lead the way to an enlightened and fair asylum appeals process.

There are hopeful indications that the Immigration and Asylum Chamber are willing to consider what they might learn from other tribunals. Most recently “With the increasing and welcome bringing together of the judicial family within HMCTS, there is a lot to be learned by courts and tribunals in the exchange of knowledge and expertise.” This thesis seeks to add to that discussion and to shed light on the circumstances of appellants who have been tortured and turn to our asylum appeal system for protection of their basic human rights. The principles of ‘natural justice’ require that tribunals approach each appeal with an open mind and decide each fairly, independently and impartially. This study suggests that achieving this consistently in asylum appeals remains a challenge and has sought to identify achievable means by which this might be addressed.

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